Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

PETE WILSON, *et al.*,

*Petitioners,*

v.

UNITED STATES DISTRICT COURTS FOR THE EASTERN AND NORTHERN DISTRICTS OF CALIFORNIA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should the Judiciary be compelled under the Prison Litigation Reform Act (18 U.S.C. § 3626(f)(4)) to pay the compensation and costs incurred after the Act's effective date by Special Masters appointed prior to the effective date?

## LIST OF PARTIES

The petitioners are Pete Wilson, Governor of the State of California; Joseph Sandoval, Secretary of the California Youth and Adult Correctional Agency; Thomas Maddock, Director of the California Department of Corrections; Nadim Khoury, Assistant Deputy Director for Health Services of the California Department of Corrections; John Zil, Chief of Psychiatric Services for the California Department of Corrections; Steven Cambra, Jr., Warden of Pelican Bay State Prison; Robert Ayers, Chief Deputy Warden of Pelican Bay State Prison; and Susann Steinberg, Chief Medical Officer of Pelican Bay State Prison.

The respondents are the district courts for the Eastern and Northern Districts of California.

The nominal real parties in interest are two classes of inmates. The class in *Coleman v. Wilson* is "all inmates with serious mental disorders who are now, or who will in the future, be confined within the California Department of Corrections (except the San Quentin State Prison, the Northern Reception Center at Vacaville and the California Medical Facility – Main at Vacaville.)" The class in *Madrid v. Gomez* is "all prisoners who are, or will be, incarcerated by the State of California Department of Corrections at Pelican Bay State Prison."

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## MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully move this Court for leave to file the annexed petition for writ of certiorari under Title 28 United States Code Section 1651, directed to the United States District Court for the Eastern and Northern Districts of California, to review orders entered on July 12, 1996, in *Coleman v. Wilson*, 933 F. Supp. 954 (E.D. Cal. 1996), and July 26, 1996, in *Madrid v. Gomez*, explained at 940 F. Supp. 247 (N.D. Cal. 1996), more particularly described in the accompanying petition, and for such other and further relief as may be just and proper.

This motion is made in conjunction with a petition for writ of certiorari under Title 28, United States Code section 1254(1), to review an order of the United States Court of Appeals for the Ninth Circuit, entered December 24, 1996 in the same proceedings.

Dated: March 24, 1997.

Respectfully submitted,

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, the Governor of the State of California and California prison officials, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit and the orders of the United States District Courts for the Eastern and Northern Districts of California.

## OPINION OR JUDGMENT BELOW

The opinion of the court of appeals (Appendix A) is reported as *Wilson v. United States Dist. Court*, 103 F.3d 828 (9th Cir. 1996). The opinion of the district court in *Coleman* (Appendix B) is reported as *Coleman v. Wilson*, 933 F. Supp. 954 (E.D. Cal. 1996), and the opinion of the district court in *Madrid* (Appendix C) is reported as *Madrid v. Gomez*, 940 F. Supp. 247 (N.D. Cal. 1996).

## STATEMENT OF JURISDICTION

The court of appeals denied petitions for writs of mandate on December 24, 1996. (Appendix A.) The Court has jurisdiction under 28 United States Code section 1254(1). The jurisdiction of this Court to review directly these orders of the district courts is appropriate under 28 United States Code section 1651.

## CONSTITUTIONS, STATUTES OR REGULATIONS

United States Code, Title 18, Section 3626(f)(4):

> The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

United States Code, Title 18, Section 3626(g)(7)-(9):

> (g) Definitions – As used in this section –
>
> (7) the term "prospective relief" means all relief other than compensatory monetary damages;
>
> (8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and
>
> (9) the term "relief" means all relief in any form that may be granted, or approved by the court, and includes consent decrees but does not include private settlement agreements.

United States Code, Title 28, Section 1651:

> Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all

writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Prison Litigation Reform Act, Pub. L. No. 104-134, § 802(b):

(1) IN GENERAL – Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was granted or approved before, on, or after the date of enactment of this title.

1996 Omnibus Appropriations Act, Pub. L. No. 104-208, Title III, § 306:

None of the funds available to the judiciary in fiscal years 1996 and 1997 and hereafter shall be available for expenses authorized pursuant to section 802 (a) of title VIII of section 101 (a) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104-134, for costs related to the appointment of Special Masters prior to April 26, 1996.

## STATEMENT OF THE CASE

### A. Coleman

The plaintiff class asserted a claim pursuant to 42 United States Code section 1983 alleging that defendants have been deliberately indifferent to their serious mental

health needs in violation of the Eighth Amendment. *Coleman v. Wilson*, 912 F. Supp. 1282, 1293 (E.D. Cal. 1995).[1] In its order of September 13, 1995, the district court concluded that defendants had acted with deliberate indifference to the serious mental health needs of the plaintiff class. It ordered that defendants plan and implement changes in their mental health care delivery system, and ordered that a special master be appointed to assist defendants in the development of the plans and to report to the court concerning compliance. *Id.* at 1323-24.

On December 11, 1995, the court appointed J. Michael Keating, Jr. to serve as the special master pursuant to Rule 53 of the Federal Rules of Civil Procedure. Defendants were ordered to deposit $250,000 with the clerk of the court for the payment of Mr. Keating's fees and expenses. Mr. Keating's court-ordered rate of compensation is $150 per hour. (Appendix D.)

The President signed the Prison Litigation Reform Act (PLRA) on April 26, 1996. Section 802(f)(4) of the Act, now codified as 18 United States Code section 3626(f)(4), provides, in pertinent part, that "compensation and costs [of special masters] shall be paid with funds appropriated to the Judiciary."

On May 9, 1996, the district court directed the parties to file briefs on the applicability of the PLRA to the special master in this case. (Appendix E.) On July 12,

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[1] The district courts' decisions on the merits of the class claims in *Coleman* and *Madrid* are not directly at issue in the present petition. Because both of those decisions are quite lengthy and are published, they have not been reproduced in the appendices to this petition.

1996, the district court issued a published decision refusing to apply section 802(f)(4) because it found that existing special masters are not "relief" under the PLRA. (Appendix B.) Following that order and pursuant to the order of reference, the district court ordered defendants to make a second deposit of $250,000 with the clerk of the court for payment of the fees and expenses of the special master. (Appendix F.)

**B. Madrid**

The plaintiff class asserted claims pursuant to 42 United States Code section 1983 challenging a variety of conditions and practices at Pelican Bay. *Madrid v. Gomez*, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995). On January 10, 1995, the district court found systemic Eighth Amendment violations with respect to excessive force, medical and mental health care delivery, and the housing of certain mentally ill prisoners in the Security Housing Unit. *Id.* at 1279-1280. The district court appointed Thomas F. Lonergan as special master, under Federal Rule of Civil Procedure 53 and the inherent powers of the court, to assist the court in fashioning and implementing an appropriate remedy. *Id.* at 1282-85. The court also ordered defendants to work with plaintiffs and the special master to draft a remedial plan.

On January 23, 1995, the court issued an order of reference setting forth the specific powers and duties of the special master. Mr. Lonergan's court-ordered rate of compensation is $125 per hour. (Appendix I.) Defendants were ordered to deposit $150,000 into an account established by the clerk of the court for payment of the special

master's fees and expenses at the time, and were ordered to deposit additional installments of $150,000 on June 1, 1995, November 15, 1995, and March 20, 1996. (Appendix J.)

On May 2, 1996, the district court directed the parties to submit letter briefs addressing the impact of the PLRA on the experts and staff of the special master. (Appendix K.) At a hearing on these issues on May 21, 1996, the district court requested supplemental briefs addressing any constitutional issues raised by the application of the PLRA. (Appendix L.)

On July 26, 1996, the district court issued an order concluding that 18 U.S.C. § 3626(f)(4) does not apply to this case, and requiring defendants to make another payment of $150,000 toward the expenses of the special master's office. The order stated that a "full decision explaining the court's reasoning" would follow "as soon as possible." (Appendix M.) On August 23, 1996, the court provided that explanation in the decision published at 940 F. Supp. 247.

### C. Defendants' Attempts to Appeal

Defendants attempted to appeal the decisions on the merits in *Coleman* and *Madrid*. (Appendices G, N.) In both cases the court of appeals dismissed the appeals for lack of jurisdiction. The appeals were considered premature because the findings of unconstitutionality and directives to prepare remedial plans were not considered final within the meaning of 28 United States Code section 1291. (Appendices H, O.)

### D. Writs of Mandate

Petitions for writs of mandate were filed from the district courts' orders on the special masters' fees provisions of the PLRA. The court of appeals consolidated the cases prior to oral argument. (Appendix P.) On December 24, 1996, after full briefing and oral argument, the court of appeals denied the petitions, finding that the issue was not properly before it on petitions for writs of mandate.[2] (Appendix A.)

## REASONS FOR GRANTING THE PETITION

### A. Application of the Prison Litigation Reform Act

The application of the PLRA presents an important question of federal law which has not been, but should be, settled by this Court. In addition, the decisions of the district courts and of the court of appeals conflict with the clear intent of Congress and with relevant decisions of this Court regarding retroactivity and mandamus.

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[2] A petition for writ of mandate and a contemporaneous notice of appeal were also filed in a third case, *Gomez v. United States Dist. Court (Gates)*, which was also the subject of the Ninth Circuit's December 24, 1996 decision. *Gates* is procedurally distinct in that a consent decree was entered in that case on March 8, 1990, and the PLRA appellate proceedings followed well after that entry of judgment. In addition the basis of the district court's order, in part, was that the "mediator" appointed in *Gates* was not a "special master" within the meaning of the PLRA. The appeal of the special master issues in *Gates* remains pending in the Ninth Circuit. Accordingly, the *Gates* defendants do not join in this petition for writ of certiorari.

Title 18, United States Code, Section 3626(f)(4) is clear, direct and explicit. It provides that special masters in prison cases are to be paid out of funds appropriated to the Judiciary – not out of State funds.

As the PLRA does not state an effective date, it became effective on April 26, 1996, the date it was signed into law by the President. *United States v. Bafia*, 949 F.2d 1465, 1480 (7th Cir. 1991), *cert. denied, Kerridan v. United States*, 504 U.S. 928 (1992); *United States v. Clizer*, 464 F.2d 121, 123 n.2 (9th Cir.), *cert. denied*, 409 U.S. 1086 (1972).

If the district courts had followed the clear direction of Congress then the Judiciary would now be paying the compensation and costs of work performed by special masters on or after April 26, 1996.[3] The district courts in these cases, however, continue to impose this burden on the State. They purport to find support for their disregard of the law's directive in this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

*Landgraf* recognizes, however, that even in the absence of express legislative pronouncement, the application of a new statute to pending cases "is unquestionably proper in many situations." *Id.* at 273. For example

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[3] The state officials in these cases are not seeking to recoup prior expenditures or refund of monies paid to the courts pursuant to orders issued before the effective date of the PLRA. Instead they assert that the special master payment provision should be applied prospectively to work performed on or after the effective date of the statute. This is consistent with the 1996 Omnibus Appropriations Act, which prohibited the Judiciary from paying costs related to the appointment of special masters prior to April 26, 1996. (Pub. L. No. 104-208, Title III, § 306, 142 Cong. Rec. H11656.)

there is no retrospective application where the law operates *"in futuro," id.* at 1501, such as in this case where it applies to work performed by the special masters after the effective date of the statute. A court should not, of course, apply a new law to an existing case where Congress has expressly declared its intent that the law not apply to existing cases. But in the absence of any express statement, the court should only refuse to apply the law where applying the law would have a genuine retroactive effect. *Landgraf*, 511 U.S. at 269-270, 273, 280.

Neither district court in this case found any express statement by Congress that the new law should not apply to existing special masters. The district courts should therefore have followed *Landgraf* and inquired whether paying special masters out of Judiciary funds would impair the rights of any party. *Landgraf*, 511 U.S. at 280. Since neither the Judiciary nor the special masters are parties to the underlying actions, the obvious answer to that inquiry is "no."[4] Instead the courts engaged in

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[4] The *Madrid* court found that applying section 3626(f)(4) would alter the legal consequences both for it and for the special master, and therefore the statute operated retroactively. *Madrid*, 940 F. Supp. at 253. The district court provided no authority for its startling conclusion that the consequences to a court or its agent are germane to a consideration of the retroactivity of a law. The court's concerns seem mainly addressed to the reduction of the special master's hourly compensation under the Act. Petitioners see no reason why the district courts could not elect to pay a higher hourly rate upon properly supported factual findings that the higher rate is necessary to secure the services of a competent special master. Had the district courts accepted their responsibility to pay the special masters, petitioners would not have standing to object to the rate of

semantic and analytic machinations to reach the conclusion that a special master is not "relief," *Madrid*, 940 F. Supp. at 250-252; *Coleman*, 933 F. Supp. at 956-957, and that the new statute cannot be applied to existing special masters.[5]

In order to justify the conclusion that the Judiciary should not pay the prospective compensation and costs of the previously appointed special masters, the district courts created new tests for retroactivity and examined factors inconsistent with those established in *Landgraf*. Thus a clear error of law was committed in the first two published cases to interpret this part of the new federal statute, and certiorari should be granted to correct it.

### B. Review by the Court of Appeals on Mandamus

Petitioners sought review of the erroneous orders of the district courts by way of petitions for writs of mandate. The court of appeals never reached the merits of this controversy. Instead, it denied the petitions not because the district courts were correct, but because in

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compensation paid by the Judiciary. In any event, the district courts' concerns regarding the fee-reducing provision do not make the fee-shifting provision retrospective.

[5] Section 3626, which includes the provisions regarding special masters, applies "with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment." 1996 Omnibus Appropriations Act, Title VIII - Prison Litigation Reform, Pub. L. 104-134, § 802 (b)(1). Further, "the term 'prospective relief' means all relief other than monetary damages;" and "the term 'relief' means all relief in any form that may be granted or approved by the court, . . . " 18 U.S.C. § 3626(g)(7), (9).

the absence of precedent petitioners could not demonstrate "clear" error in this case of first impression. The court of appeals also noted that it was not convinced the error could not be corrected on appeal.

Mandamus should have been granted because of the district courts' refusal to follow an important new act of Congress. The district courts' orders were neither themselves appealable nor likely to be reviewed following some future appealable order, and unless reviewed by writ the harm to the State from making unlawfully high payments to special masters may never be remedied. Petitioners are left with the requirement to reallocate millions of dollars in State resources to the federal courts without any assurance that the legal question in this case will ever be addressed. This case presents a pure question of law upon which there can be no further significant factual or procedural development. The court of appeals should have decided the merits of this controversy.

The court of appeals purported to apply a "stringent five-factor test" in order to determine whether there were exceptional circumstances which would justify the issuance of the writs. *Wilson v. United States Dist. Court*, 103 F.3d at 829. In reality, it mechanically applied a single factor – whether there was "clear" error – and dismissed every important consideration in this case.

The court of appeals failed to give any weight to the well-established interests of State prison officials performing a core State function. As this Court has long recognized, "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and

procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973); *see also, Lewis v. Casey*, 116 S. Ct. 2174, 2197 (1996) (Thomas, J., concurring). One need only review the text of the Prison Litigation Reform Act to conclude that the Act was intended to foster stronger recognition by the federal courts of the States' interests in managing their prisons. The reliance of a federal court on a special master to develop remedies and oversee the operation of a state prison is among the most intrusive measures a federal court can take. *See, e.g., Gates v. Shinn*, 98 F.3d 463, 465-466, 469-470 (9th Cir. 1996).

Moreover, both of the cases below are large-scale class actions – *Madrid* involving an entire prison housing some 3,500 maximum security inmates, and *Coleman* encompassing all aspects of mental health care for seriously mentally ill prisoners in 30 California prisons. In both cases, the orders following trial found the defendants liable for constitutional violations and appointed special masters. In both cases the court of appeals found those orders to be unappealable. (Appendices G, H, N, O.) Thus, the issue of when, if ever, petitioners will be able to appeal those orders remains open while the special masters continue to accumulate millions of dollars in compensation and costs operating outside of the explicit limitations imposed by Congress.

Even assuming the issue in this case could be raised in connection with some appealable order at some future time, it is not clear that the error could be corrected in any meaningful way. The State of California is paying fees to private persons (the masters) at a rate far in excess of that authorized by Congress. If the State prevails on

these issues in some future appeal, where would the State go to get a reimbursement order – to the very courts who have refused to acknowledge their obligation to pay? Even if the district court were to accept its responsibility to pay the rates authorized by Congress, who would reimburse the states for the overage? What about the funds that are disbursed by the special masters to their assistants? Given the large sums of money to be repaid,[6] the prospects for the error being corrected on appeal are speculative at best.

Since the courts of appeals may appropriately consider on mandamus the reference to a special master, *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255-256 (1957), the court of appeals should have issued mandamus to correct the refusal by the district courts to comply with new legislative limits on their use of special masters. Issuance of mandamus is particularly appropriate where, as here, the district court has "practically nullified" a rule it was required to follow. *Id.* at 256-257. In addition, this case, like *La Buy*, presents the unusual circumstance of seeking mandamus strictly to control how the court operates rather than to regulate the conduct of the opposing party.

The court of appeals erroneously concluded that the existence of "clear" error is the dispositive factor on mandamus, and also misconstrued that factor. The court stated the district courts did not commit "clear" error,

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[6] At the time that the writs were filed in the court of appeals the master's fees and expenses were more than $40,000 per month in *Coleman* (Appendix F), and approximately $75,000 per month in *Madrid*. (Appendix J.)

noting that there was no published precedent to the contrary on the issue in question. *Wilson*, 103 F.3d at 830. In other words, there can be no "clear" error, and thus no issuance of a writ of mandate, so long as the issue is one of first impression. This surprising conclusion is contrary to this Court's decisions, to decisions from the other circuits, and to the flexible purposes underlying mandamus power. *See, e.g., Schlagenhauf v. Holder*, 379 U.S. 104, 110-111 (1964); *United States v. Horn*, 29 F.3d 754, 769-70 (1st Cir. 1994); *Nasuti v. Scannel*, 906 F.2d 802, 811, n.15 (1st Cir. 1990); 16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3933 and n.36 (1996).

Given the interests at stake, the district courts should not have been excused for the errors simply because they were the first courts to publish rulings on the question. To the contrary, the fact that they are in the forefront on this issue of national importance is all the more reason why their decisions should be rendered correctly, and why mandamus was appropriate to correct their errors. *See Schlagenhauf v. Holder*, 379 U.S. at 110 ("That this issue was substantial is underscored by the fact that the challenged order requiring examination of a defendant appears to be the first of its kind in any reported decision in the federal courts. . . . "); *Nasuti v. Scannel*, 906 F.2d at 811 (the district court's order was so lacking in statutory basis and so clearly contrary to Congressional policy as to require review by mandamus); *see also, United States v. Horn*, 29 F.3d at 770 (mandamus granted where issue bears importantly on the relationship between the Judicial Branch and the Executive Branch).

The district courts in this case ignored a clear statutory command and disregarded the legislative policy

behind 18 U.S.C. §3626(f)(4), which is to limit the use of special masters in prison litigation to that which is truly necessary to remedy a violation of federal law. Upon the presentation of this weighty issue to the court of appeals in the petitions for writs of mandate, it was incumbent upon that court to determine whether the district courts were in error and whether the error should better be corrected on appeal. It was inconsistent with the decisions of this Court and of other circuits to dismiss the petitions simply because the error was one of first impression, or because of a speculative possibility that the error could be corrected on appeal.

It was as inappropriate for the court of appeals to refuse to address the merits as it would have been for the district courts to so refuse. The passage of an indefinite period of time will not further inform the judiciary of Congress' intent, but it will prejudice the State by allowing the district courts to disregard an act of Congress.

This Court should grant the petition for certiorari, and order the court of appeals to grant the petitions for writs of mandate or alternatively instruct the district courts to apply section 3626(f)(4) of the PLRA.

## CONCLUSION

For the above reasons, petitioners respectfully request this Court to issue writs of certiorari to the United States Court of Appeals for the Ninth Circuit, and to the United States District Court for the Northern District of California, to review and reverse the decision in this case.

Dated: March 24, 1997.

Respectfully submitted,

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**EXHIBIT A**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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|---|---|
| PETE WILSON, JOSEPH SANDOVAL, JAMES GOMEZ, NADIM KHOURY, and JOHN ZIL,<br>*Petitioners,*<br>v.<br>THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,<br>*Respondent,*<br>RALPH COLEMAN, et al.,<br>*Real Parties in Interest.* | No. 96-70640<br>D.C. No. CIV-S-90-0520-LKK<br>ORDER |
| JAMES GOMEZ, NADIM KHOURY, SYLVIA BLOUNT, CLYDE MURREY, DANIEL E. THOR, EDDIE YLST, KENNETH SHEPARD, PAUL MORENTZ, DOUGLAS ARNOLD, and BRUCE BAKER and their successors in interest,<br>*Petitioners,*<br>v.<br>UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,<br>*Respondent,*<br>JAY LEE GATES, et al.,<br>*Real Parties in Interest.* | No. 96-70687<br>D.C. No. 87-1636 LKK |

Appeals from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

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| JAMES GOMEZ, DIRECTOR; STEVEN CAMBRA, JR., WARDEN; ROBERT AYERS, CHIEF DEPUTY WARDEN and SUSANN STEINBERG, CHIEF MEDICAL OFFICER,<br>*Petitioners,*<br>v.<br>THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,<br>*Respondent,*<br>ALEJANDRO MADRID, et al., on behalf of themselves and all others similarly situated,<br>*Real Parties in Interest.* | No. 96-70659<br>D.C. No. C-90-3094 TEH |

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
November 7, 1996 – San Francisco, California

Filed December 24, 1996

Before: Betty B. Fletcher, Jerome Farris and
A. Wallace Tashima, Circuit Judges.

## COUNSEL

Daniel E. Lundgren, Attorney General of California, Bruce M. Slavin, Deputy Attorney General, San Francisco, California, for the petitioners.

Susan Creighton, Palo Alto, California, for the real parties in interest in Nos. 96-70640 and 96-70659.

Michael W. Bien, San Francisco, California, for the real parties in interest in No. 96-70687.

No appearance for the respondents.

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## ORDER

These three cases involve the common issue of whether the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, Title I, § 101(a) [Title VIII, § 802(a)], 110 Stat. 1321-66, codified at 18 U.S.C. § 3626, applies retroactively to limit the compensation of special masters appointed before the PLRA's effective date.[1] In each of these cases, petitioners seek a writ of mandamus commanding the district court to vacate its order holding, in substance, that § 802 does not apply retroactively to a special master appointed before the PLRA's effective date.

The portion of the PLRA at issue provides:

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[1] No. 96-70687 also involves the additional issues of whether a "mediator" appointed pursuant to a consent decree in the underlying action is a "special master," as that term is used in the PLRA and, if so, whether a special master appointed pursuant to a consent decree is subject to the limitations of the PLRA. For convenience, we assume without deciding, that the mediator is a special master under the PLRA.

> The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

18 U.S.C. § 3626(f)(4).[2] In these cases, the special masters' compensation is paid by petitioners and range from $90.00 to $250.00 per hour. The parties agree that the hourly rate established under 18 U.S.C. § 3006A is $75.00.[3] Thus, the remedy petitioners seek is to limit the special masters' compensation to $75.00 per hour and for such compensation to be paid by the courts, rather than petitioners.

Mandamus is an extraordinary remedy limited to "exceptional circumstances." *Will v. United States*, 389 U.S. 90, 95 (1967). We have long applied a stringent five-

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[2] The PLRA became effective on April 26, 1996, when it was signed by the President. Its "Application" subsection provides:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title.

Pub. L. No. 104-134, Title I, § 101(a) [Title VIII, § 802(b)].

[3] Although the court is aware that in death penalty habeas corpus cases, appointed counsel are compensated under § 3006A at hourly rates of $125.00 and $150.00 in several California districts, it is unnecessary to resolve the meaning of the term "the hourly rate established under section 3006A for payment of court-appointed counsel" in these cases.

factor test to determine whether such exceptional circumstances are present. Petitioners must show: (1) They have no other adequate means to attain the relief they seek; (2) They will be damaged or prejudiced in a way not correctible on appeal; (3) The district courts' orders were clearly erroneous as a matter of law; (4) The orders are oft-repeated errors, manifesting persistent disregard for federal rules; and (5) The orders raise new and important problems or issues of law of first impression. *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977).

While no single factor is determinative and all five factors need not be satisfied, "it is clear that the third factor, the existence of clear error as a matter of law, is dispositive." *Executive Software N. Am., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1551 (9th Cir. 1994) (citations omitted). However, we will not grant mandamus relief "simply because a district court commits an error, even one that would ultimately require reversal on appeal." *King v. United States Dist. Court*, 16 F.3d 992, 993 (9th Cir. 1994) (Reinhardt, J., concurring). As we have said many times, the error must be "clear." *E.g., Executive Software*, 24 F.3d at 1551; *King*, 16 F.3d at 993; *Washington Pub. Util. Group v. United States Dist. Court*, 843 F.2d 319, 325 (9th Cir. 1987).

Although a number of other courts have confronted the issue of the retroactivity of other provisions of the PLRA, there is no published precedent from any court other than respondent courts on the retroactive application of the special master provision. In reviewing § 3626(f)(4) and its legislative history under the retroactivity analysis of *Landgraf v. USI Film Prod.*, 114 S. Ct.

1483, 1505 (1994), we cannot say that the district courts' conclusion of non-retroactive application is clearly erroneous. Moreover, we are not convinced that the error petitioners contend the respondent courts have committed cannot be corrected on appeal if, indeed, error has been committed.

For the foregoing reasons, the petitions are **DENIED**.

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**EXHIBIT B**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RALPH COLEMAN, et al.,
Plaintiffs,
v.
PETE WILSON, etc., et al.,
Defendants.
_____/

NO. CIV. S-90-520 LKK

ORDER

(Filed Jul. 12, 1996)

This court previously entered an order appointing a special master in this litigation concerning the conditions of confinement experienced by a class of California prisoners. Below, the court determines the effect of the Prison Litigation Reform Act on the compensation ordered paid the special master.

## I.

## HISTORY OF THE LITIGATION

Plaintiffs, a class composed of mentally ill inmates in California's prisons, brought suit under 42 U.S.C. § 1983 alleging that they were being deprived of adequate medical care in violation of the Eighth Amendment to the Constitution of the United States. The matter was referred to a magistrate judge of this court who, after trial, found for plaintiffs and recommended various remedial orders. The defendants filed objections and, after extensive briefing and argument, this court on September 13, 1995 entered an order which essentially adopted the magistrate judge's findings and noted that

his recommendations "were to be implemented by subsequent order of the court." *Coleman v. Wilson*, 912 F. Supp. 1282, 1324 (E.D. Cal. 1995).

In the same order the court, concluding that "[m]onitoring compliance with the injunctive relief ordered" would be a "formidable task," and thus exceptional circumstances existed, *see* Fed. R. Civ. P. 53(b), determined that appointment of a special master was appropriate. *Coleman*, 912 F. Supp. at 1324. The special master's duties were to be "twofold: to provide expert advice to the defendants to aid in ensuring that their decisions regarding the provision of mental health care to class members conform to the requirements of the federal constitution, and to advise the court concerning issues relevant to assessing defendants' compliance with their Constitutional obligations." *Id.* at n. 63. The matter was then referred back to the magistrate judge for recommendations concerning who should be appointed as special master.

After consulting with the parties the magistrate judge recommended an experienced prison conditions special master, Michael Keating, Jr. On December 11, 1995, by order of this court, Mr. Keating was appointed. The reference to the special master directed the implementation of the remedial orders adopted by the court and the defendants were ordered to pay his compensation and expenses as a cost of suit. *See* Fed. R. Civ. P. 53(a).[1] Since then, the special master has undertaken the discharge of

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[1] Compensation was fixed at one hundred fifty dollars per hour except for travel time which was allowed at seventy five dollars an hour.

his duties, and with the approval of the court, hired staff and various experts to assist him. Subsequent to the adoption of the legislation in issue here, the special master, uncertain as to the rate of his own compensation and whether his staff and retained experts would be compensated at all, ceased work pending this court's further direction.

## II.

## THE PLRA AND ITS EFFECT

On April 26, 1996, the President signed into law an omnibus appropriations measure, which included amendments to 18 U.S.C. § 3626. These amendments, known as the Prison Litigation Reform Act ("PLRA"), establish detailed rules for the administration of prison litigation, including limiting the compensation special masters may receive and directing that their compensation be paid by the federal judiciary. *See* 18 U.S.C. § 3626.[2] Because the Act may apply to this court's previous order, because it may have a significant effect on the special

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[2] Relative to compensation, the PLRA provides:

> The compensation to be allowed to a special master under this section shall be based on an hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriate to the Judiciary.

18 U.S.C. § 3626(f)(4).

By virtue of the Act, compensation for special masters appointed in this district will be limited to seventy five dollars per hour.

master and his ability to perform his duties, and because the special master is unable to proceed without clarification of his compensation, the court requested, and the parties have submitted, briefing on the issue of the effect of the PLRA's compensation clause.[3]

The statute provides that § 3626, as amended, "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." § 802(b) of Title VIII of the Appropriations for, *inter alia*, the Judiciary. The statute then defines prospective relief as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). In turn, 18 U.S.C. § 3626(g)(9) defines the term relief as "all relief in any form that may be granted or approved by the court. . . . " Thus, to the extent that it may constitutionally do so, § 3626 applies to all non-monetary relief ordered in the matter at bar.[4] Under these circumstances, the first question that is tendered is

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[3] Subsequent to the hearing, the court requested input from the special master concerning the effects of the application of the PLRA on his ability to perform his duties. Mr. Keating submitted an affidavit which explained, *inter alia*, his overhead, the background and compensation for his staff, and expressing his concern that "the proposed fee reduction demeans my experience, reputation and ability and the dignity and value of the office of the special master," he avers that "I will not continue to serve in the role at that rate." Declaration of J. Michael Keating Jr., filed June 24, 1996, at 7.

[4] The constitutionality of this statute is under question in a number of courts across the country. One district court has already entered an order declaring the automatic stay provision of the PLRA as unconstitutional. *See Hadix v. Johnson*, No. 4:92:CV:110 (W.D. Mich. July 3, 1996).

whether the appointment of Mr. Keating is "relief" for purposes of § 3626.[5]

Plaintiffs argue that the appointment of a master is a means of facilitating relief, rather than relief itself, and accordingly the statute does not effect compensation of a

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[5] At least two other questions are potentially also tendered by the statute's locution: Are the orders concerning a master's renumeration [sic] "compensatory monetary damages," and does the compensation provision apply if Mr. Keating was not appointed under this section? Both questions are less straight forward then they first appear.

Thus the statute provides for "[t]he compensation to be allowed to a special master under this section. . . . " § 3626(f)(4). If this phrase is understood to mean masters appointed under the amended § 3626, the subsection does not apply to Mr. Keating because he was appointed before the section existed. On the other hand, if it was intended that (f)(4) apply to any master whether appointed "before, on or after" adoption of the statute, then under the statute Mr. Keating's compensation has been reduced from $150 per hour to $75 per hour, despite his having agreed to accept the position based on the higher rate. A proper resolution of this issue may turn on whether Congress has specified the retroactive effect of (f)(4), or whether there is an ambiguity; *See Landgraf v. US Film Products*, 511 U.S. ___, 128 L.Ed.[2d] 229 (1994).

Moreover, given that Mr. Keating has undertaken the discharge of his duties pursuant to the court's previous order, and changed his position in reliance thereon, there is a question as whether as to him there is a final order relative to compensation which Congress may not now alter. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. ___, 131 L.Ed.2d 328 (1995).

Given the disposition of the question of the meaning of "relief" in the text, I need not address these difficult questions which implicate issues of a constitutional dimension.

previously appointed "master."[6] The matter is one of statutory construction. Accordingly, I first turn to the statutory definition. *See Gustafson v. Alloyed Co.*, ___ U.S. ___, 131 L.Ed.2d 1, 21 (1995) (Thomas, J. dissenting *citing FDIC v. Meyer*, 510 U.S. ___, 127 L.Ed.2d 308 (1994)) (Where the statute defines a term that definition, rather than common meaning, governs).

Unfortunately, the statutory definition of "relief" violates the first rule of a meaningful definition, which is that "[t]he term being defined or a synonym of it should not appear in the definition." *Harris v. Tomczak*, 94 F.R.D. 687, 698 n.17 (E.D. Cal. 1982) (quoting Daniel S. Robinson, *The Principles of Reasoning: Introduction of Logic and Scientific Method*, (3rd Ed., 1947) at p. 58.) The reason for this rule is plainly demonstrated by the instant case. The statutory definition sheds no light on the disputed term's meaning since "relief" is in essence defined as all relief.

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[6] Remarkably, defendants do not respond to the argument, apparently taking the position that if the statute applies at all, it self-evidently applies to the future compensation due the master. In sum, their position appears to be that because the statute specifies application to relief granted prior to the effective date of the statute, and the overall purpose of the statute is regulation of prison conditions litigation, the term "relief" as used in the statute should include the compensation of previously appointed masters. Such a generic approach is inappropriate. While it is true that intent is gleaned from reading the statute as a whole, *Conroy v. Aniskoff*, 507 U.S. 511, ___, 123 L.Ed.2d 229, 236 (1993), Congress expresses its intent through the language it uses, and it is analysis of that language which determines its intent. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, ___, 117 L.Ed.2d 391, 397 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says").

Thus, while the definition teaches that it encompasses all instances of the term, it does not tell us what demarks and distinguishes those instances from others. Accordingly, the court must look elsewhere. Doing so leads to the conclusion that compensation of a special master is not "relief" within the meaning of the statute.

Because "relief" in this context addresses a question concerning the orders of a court, it is appropriate to look to whether the term has a specialized legal meaning. *See Youngberg v. The Bekins Co.*, ___ F. Supp. ___, No. CIV S-95-896, slip. op. at 8 n.7 (E.D. Cal. June 24, 1996) (quoting *Evans v. United States*, 504 U.S. 255, 259 (1992)). The standard legal dictionary suggests as a definition of relief in this context " . . . a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity. It may be thus used of such remedies as specific performance, injunction, or the reformation of recision of contracts." *Black's Law Dictionary*, 5th Ed., p. 1161. This definition, focusing on the ultimate legal form of remedy rather than the means of achieving the remedy, appears to favor plaintiffs' position. Moreover, to the extent that the definition points the court to the plaintiffs' requested remedy, i.e. "assistance, redress, or benefit which a complainant seeks," a review of the amended complaint indicates that the appointment of a special master was not sought by the plaintiffs.

An interpretation recognizing a distinction between the relief ordered and the appointment of a special master is supported by the court's order adopting the magistrate judge's findings and recommendations in this case. There, the court distinguished between the remedies

required to cure the constitutional deficiencies, *Coleman v. Wilson*, 912 F. Supp. at 1323, and the appointment of a special master. *Id.* at 1324 (noting the need to appoint a master "to monitor compliance with the court ordered injunctive relief").

All the above leads the court to conclude that, although § 3626 may apply to "future prospective relief," that term does not apply to the compensation of a previously appointed special master.[7] The court concludes that the amendments to § 3626 effectuated by the PLRA are inapplicable to the court's appointment of Michael Keating, Jr. in the matter at bar.

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[7] While the court believes that the issue is resolved by virtue of the meaning of the word "relief," viewed as a term of art, even if there is an ambiguity, the resolution of the question adopted in the text would be appropriate because it avoids the constitutional question noted in n.5 *supra*, which might otherwise have to be addressed. *See St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981); *DeBartolo Corp. v. Florida Gulf Trades Council*, 485 U.S. 568, 575 (1988).

The court also believes that since construction can be resolved as a matter of plain legal meaning, it need not examine the legislative history. If called upon to do so, the court notes that the history at least suggests that Congress, having been warned of the possible constitutional issue, revised the statute's language from its originally introduced language to its present form. *See* S. 400, 104th Cong., 1st Sess. (February 14, 1995); S. 866 104th Cong., 1st Sess. (May 25, 1995); S. 1279, 104th Cong., 1st Sess. (September 27, 1995); 141 Cong. Rec. § 14408-10, § 14418 (September 27, 1995); 1995 WL 496910 (F.D.C.H.) at 13.

Accordingly, Mr. Keating is DIRECTED to resume his duties and the state is ORDERED to continue to compensate him under the court's original order.[8]

IT IS SO ORDERED.

DATED: July 11, 1996.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

United States District Court
for the
Eastern District of California
July 15, 1996

* * CERTIFICATE OF SERVICE * *

2:90-cv-00520

Coleman

v.

Reagan

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[8] Mr. Keating has also expressed concern that 18 U.S.C. § 3626(f)(6)(B), restricting ex parte communication by the special master "negates the traditional mediating role [of] masters". The court had read the section as relating solely to formal factfinding and thus having no effect on the master's mediation role. Given the master's reading, the court now directs the defendants, if they share the master's view, to bring on a motion to modify the Order of Reference in this regard within fifteen (15) days. If defendants fail to do so, the issue will be deemed waived.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 15, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Donald Specter
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**EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEJANDRO MADRID, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES GOMEZ, Director, California Department of Corrections, et al.,

Defendants.

NO. C90-3094-TEH

CLASS ACTION

ORDER

(Filed Aug 23, 1996)

This matter comes before the Court on the issue whether section 802(a)(f)(4) of the recently enacted Prison Litigation Reform Act ("PLRA"), Pub.L. 104-134, 110 Stat. 1321 (amending 18 U.S.C. § 3626), applies retrospectively to this case.[1] After carefully considering the parties'

[1] The Court originally asked the parties to file expedited letter briefs on the following two issues: "(a) the impact of that portion of Section 802[a](f)(4) of the Act which provides that 'Such compensation and costs [of Special Masters] shall be paid with funds appropriated to the Judiciary,' on experts and staff of the Special Master, and, (b) if such provision governs the compensation of experts and staff, whether such provision is enforceable in the event federal funds are not made available."

The Court initially framed the questions in this way because it appeared at the time that there was a potential imminent emergency concerning the Special Master's experts and staff that would be extremely disruptive to the active and ongoing remedial process. However, as the parties indicated, resolution of the above issues turns on the broader issue of the applicability of section 802(a)(f)(4) generally. Accordingly, the

initial and supplemental briefs, their oral arguments, and the record herein, we conclude that it does not for the reasons set forth below.

DISCUSSION

The PLRA imposes a number of new restrictions on actions seeking to redress unconstitutional conditions in prisons. The section presently before the Court, section 802(a)(f)(4), 18 U.S.C. § 3626(f)(4), provides that:

> The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

*Id.*[2] Defendants contend that this section applies retrospectively to this case. If so, this Court must modify that portion of its January 23, 1995 Order of Reference which (1) set the Special Master's compensation at $125 per hour[3] and (2) required defendants to bear the expense of the Special Mastership. January 23, 1995 Order at 6-7.

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Court broadened its inquiry, and when the immediate emergency dissipated, ordered the parties to file supplemental briefs.

[2] The hourly rate established under section 3006A for payment of court-appointed counsel is $75.00.

[3] The Court set this hourly rate based on its determination that it was both reasonable and consistent with the compensation that Special Master Thomas Lonergan had earned for similar work. See January 23, 1995 Order at 6.

Plaintiffs, on the other hand, argue that section 802(a)(f)(4) is not applicable to the case at bar.

To resolve this dispute we turn to the Supreme Court's decision in *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 114 S.Ct. 1483 (1994), which "signalled a significant shift in the manner in which federal courts should analyze questions involving the application of new civil statutes to conduct that has already occurred." *U.S. ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1407 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1319 (1996). Under *Landgraf*, courts must first determine "whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 114 S.Ct. at 1505. If so, that ends the matter and we follow the Congressional command (assuming such command does not itself violate the Constitution). *Id.* at 1497-98, 1505.

Where, however, no such express direction is provided, judicial default rules apply. Under these rules we first analyze whether application of the statute would operate "retroactively" by attaching new legal consequences to events completed before its enactment. *Id.* at 1499; *Lindenthal*, 61 F.3d at 1407. If the statute would have such effect, then a presumption exists against retrospective application. *Landgraf*, 114 S.Ct. at 1505. This "deeply rooted" presumption "embodies a legal doctrine centuries older than our Republic," *Id.* at 1497, and can only be overcome by clear evidence of a contrary legislative intent. *Id.* at 1498, 1505. As the Supreme Court explained, such intent ensures "that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 1498; *see also Id.* at 1501. In short, once judicial default rules apply, "*Landgraf*

teaches that courts should not apply 'retroactive' statutes 'retrospectively' absent clear congressional intent." *Lindenthal*, 61 F.3d at 1407.[4]

In this case, Congress has expressly prescribed the retrospective reach of section 802 of the PLRA, 18 U.S.C. § 3626. In a separate section at the conclusion of the statute, section 802(b), titled "Application of Amendment," Congress states as follows:

> (1) IN GENERAL – Section 3626 of title 18, United States Code, as amended by this section [i.e. the Prison Litigation Reform Act] shall *apply with respect to all prospective relief* whether such relief was originally granted or approved before, on, or after the date of the enactment of this title (emphasis added).

Thus, Congress explicitly directed that the PLRA apply retrospectively, but only with respect to "all prospective relief" that had been previously granted.[5] Accordingly,

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[4] Although the Supreme Court and other courts have sometimes used the terms "retroactive" and "retrospective" interchangeably, *see e.g. Landgraf*, 114 S.Ct. at 1498-99 & n.23, the Ninth Circuit has "clarified the terminology *Landgraf* employs by using the term 'retrospective' to describe [any] application of a new statute to events that occurred before its enactment, and reserving the term 'retrospective' to describe a statute that, if applied, would attach new legal consequences to conduct or transactions already completed." *Lindenthal*, 61 F.3d at 1407.

[5] Had Congress intended to make the entire PLRA retrospective, it could have simply said that the PLRA "shall apply with respect to *all orders and proceedings* in pending cases (or perhaps all orders and proceedings save specified exceptions), whether such order or proceeding occurred before, on, or after the date of the PLRA." By limiting the retrospective

we must determine whether that portion of the Court's January 23, 1995 order setting the Special Master's hourly rate and finding defendants responsible for the expense of the Special Mastership constitutes an order granting "prospective relief."

We begin with the definitional section of the PLRA, section 802(g) which provides definitions for the terms "prospective relief" and "relief." As noted in *Coleman v. Wilson*, ___ F.Supp. ___ (E.D. Cal. July 11, 1996)(1996 WL 405817), however, the PLRA's definitions of those terms are essentially circular and thus fail to resolve the issue before the Court. Specifically, the Act defines the phrase "prospective relief" to mean all "relief" other than compensatory monetary damages, and then defines "relief" to mean "all relief . . . " *See* 18 U.S.C. § 3626(g)(7) ("prospective relief" means "all relief other then compensatory monetary damages"); *Id.* at § 3626(g)(9) ("relief" means "all relief in any form that may be granted or approved by the Court . . . "); *see also Coleman*,___ F.Supp. ___ (statutory definition of relief "sheds no light on the disputed term's meaning since 'relief' is in essence defined as all relief"). Nor does the legislative history supply any useful clarification of the term "relief."

The Court is not, however, left without other sources of guidance. Given that the term "relief" in section 802(b) is used in the context of relief that "is granted or approved" by a court, we agree with *Coleman* that it is appropriate to construe the term in light of its traditional

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reach of the PLRA to those orders which grant or approve "prospective relief," Congress made it clear that the retrospective reach of the PLRA is more limited in scope.

legal meaning. That meaning focuses on the actual change in legal relations or in defendants' conduct or actions that cures the legal wrong and makes the plaintiff whole. *See e.g.* Black's Law Dictionary (6th Ed. 1991) (defining relief as "[d]eliverance from oppression, wrong, or injustice. In this sense it is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity. It may be thus used of such remedies as specific performance, injunction, or the reformation or recision of a contract").

Thus, while the "relief" might be reformation or recision in a contract case, reinstatement in an employment case, or a plan for desegregation in a school discrimination case, the "relief" in the instant case consists of such things as defendants' new policies regarding the use of force, expansion of the medical and mental health staff, and deployment of a screening mechanism to prevent the placement of seriously mentally ill inmates in the Security Housing Unit. All of these actions provide plaintiffs with "relief" from the constitutional deprivations proven at trial.

The two rulings affected by section 802(a)(f)(4) – specifying the Special Master's hourly rate and requiring defendants to bear this expense – stand in stark contrast to this traditional legal notion of relief. Indeed, these rulings do not provide any member of the plaintiff class with relief from any unconstitutional condition at Pelican Bay State Prison. Rather, they govern aspects of the Special Mastership which, while important, simply do not constitute "relief" as that term is traditionally understood in a legal context. Even the appointment of a Special

Master itself (much less orders specifying an hourly rate and method of payment), does not appear to constitute "relief." This is because a Special Master is simply a device utilized by the Court to assist in the formulation of appropriate relief or to monitor relief that is ordered. The appointment, however, is not itself relief.[6]

The structure of the PLRA adds further support to the conclusion that the Court's prior determinations regarding the hourly rate and the source of payment of the Special Master do not constitute "relief." Except for the separate "Application of Amendment" provision, discussed above, section 802 of the PLRA is contained in one section, 18 U.S.C. § 3626, which is divided into seven

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[6] Indeed, if the court appointed a Special Master but the defendants never actually changed the policies or practices that had been found unconstitutional, the court could not be said to have provided the plaintiff class with any "relief" from the constitutional deprivations proven at trial.

Notably, the Fifth Circuit Court of Appeals recently presumed, without expressly deciding, that a lower court's order appointing an "expert" (who appears to have functioned as a Special Master), did not constitute "prospective relief" for purposes of the PLRA. *See Williams v. Edwards*, 87 F.3d 126 (5th Cir. 1996). There, the trial court had approved a consent decree after a trial on the merits. In describing the procedural history of the action, the court of appeals discussed how the trial court's "expert" had investigated and reported to the court on housing conditions and bed space problems in the Louisiana prisons. The appellate court then held that the section of the PLRA which governs the standards for granting prospective relief had not yet been triggered because "the district court has yet to fashion any prospective relief." *Id.* at 133. Implicit in this ruling was the Court's assumption that the trial court's previous appointment of the "expert" did not constitute an order granting prospective relief.

subsections, several of which specifically address either prospective relief or relief. Thus, subsection (a) is entitled "Requirements for Relief," subsection (b) is entitled "Termination of Relief", subsection (c) is entitled "Settlements" and subsection (e) is entitled "Procedure for Motions Affective Prospective Relief." The provisions dealing with special masters, however, are contained in a separate section, subsection (f), entitled "Special Masters." Moreover, the language of subsection (f) further distinguishes Special Masters from the relief itself. For example, subsection (f)(6)(C) permits Special Masters, upon authorization by the court, to assist in the development *of the remedy,* and subsection (f)(6)(D) provides that the Special Master shall be relieved of his or her appointment once *the relief* is terminated.

Defendants assert that by making the PLRA retrospective "with respect to all prospective relief," Congress "clearly envision[ed] that *every* provision of [the PLRA] . . . [was] intended to apply [retrospectively] to pending cases." Defendants' June 18, 1996 memorandum at 8 (emphasis in original). However, as explained above, the plain language of section 802(b), the traditional legal meaning of the term "relief," and the structure of the PLRA do not make this clear at all; instead they argue to the contrary.

Defendants nonetheless contend that use of the phrase "with respect to prospective relief" was not intended to distinguish among different types of orders; rather, it was only intended to "distinguish open cases with prospective effects from cases in which judgments are irrevocably final." *Id.* This distinction is not entirely clear as even in cases in which there is a final judgment

there could be orders which have prospective effects. In any event, section 802(b) simply does not make the distinction defendants urge upon the Court. Indeed, their approach would essentially require us to rewrite section 802(b) to extend retrospective application of the PLRA to any order having a prospective "effect" rather than limiting it to those which provide prospective "relief." This we are not at liberty to do.[7]

Given all of the above, it is clear that the operative term – relief – does not encompass a prior order of the Court setting the hourly rate of a Special Master or the source of the payment. Moreover, even assuming *arguendo* that the term "relief" was found to be ambiguous in this regard, we would, for the reasons explained below, resolve that ambiguity against retrospective application in this particular case.

When Congress expressly dictates the retrospective reach of a statute but expresses this command using a term later found susceptible of more than one interpretation, we should avoid unnecessarily broad constructions that result in retroactive effects that Congress has not clearly considered. This approach is consistent with the judicial default rules fashioned by the Supreme Court in

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[7] Defendants make a similar assertion that "[b]ecause Congress plainly intended all the prospective provisions of 3626 to apply to pending cases the Court's inquiry should end right here." Defs' June 18, 1996 Memorandum at 8. This assertion, however, glosses over the actual language used by Congress. Congress did not, as defendants suggest, extend the retrospective reach of Section 802(b) to all prospective *provisions;* rather it gave the PLRA a more modest backward stretch – to all prospective *relief.*

*Landgraf* to resolve retrospectivity disputes where Congress has not clearly spoken on the question. *Landgraf*, 114 S.Ct. at 1505. As discussed above, those rules impose a clear presumption against applying legislation retrospectively that would have a retroactive effect. *Id.* at 1501, 1505, 1508 (Given public and legislative expectations, statutes with retroactive effect should not apply retrospectively absent evidence that Congress clearly favored this result).

Thus, to extent that the term "relief" is subject to more than one possible construction, it is appropriate to adopt that interpretation which avoids retroactive effects. This Court's reading of the term "relief," discussed above, clearly avoids any such effect since it precludes retrospective application of section 802(a)(f)(4). In contrast, defendants' broader interpretation would require application of section 802(a)(f)(4) to this case. More importantly, we conclude that section 802(a)(f)(4), if applied, would operate retroactively in this particular case.

As *Landgraf* makes clear, retroactivity may manifest itself in different ways depending on the context. Thus, the inquiry into whether a statute would operative retroactively in any given case can not always be solved by resort to simple formula or rigid rules. As the Supreme Court noted, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf*, 114 S.Ct. at 1498. Rather, courts assessing retroactivity "must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 1499. "The conclusion," the

Court added, "that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent or the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* As the Court acknowledged, "[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity." *Id.* The Court concluded, however, that:

> retroactivity is a matter on which judges tend to have 'sound . . . instinct[s]' . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

*Id.*

To be sure, the Supreme Court highlighted three common retroactive effects that may result from new legislation: (a) the impairment of rights a party possessed when s/he acted, (b) an increase in a party's liability for past conduct, or (c) the imposition of new duties with respect to transactions already completed. *Id.* at 1505. We do not, however, read the Supreme Court to hold, as defendants suggest, that these three examples represent the entire universe of possible retroactive effects. Indeed, such a reading would conflict with the Court's more expansive explanation of retroactivity discussed above, *Id.* at 1499, and would render all but meaningless the Court's admonition that the retroactivity judgment comes "at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.; see also Lindenthal*, 61 F.3d at 1407 (noting

the three examples cited above but defining the term "retroactive" to mean a new statute which, if applied retrospectively, "would attach new legal consequences to conduct or transactions already completed").[8]

Thus, in deciding whether the term "relief," if construed broadly, would cause retroactive effects in this case (through the retrospective application of section 802(a)(f)(4)), we focus on the basic inquiry underlying the three examples identified above: whether the statute in question (in this case section 802(a)(f)(4)) "attaches new legal consequences to [prior] events," *Landgraf*, 114 S.Ct. at 1499, or results in unfair new burdens. *Id.* at 1500 ("The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact").[9]

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[8] Indeed, it is likely that the three examples provided by the Court simply reflect the fact that the retroactivity dispute in *Landgraf* focused on the effect of new legislation on the parties. *See id.* at 1505-08. The Court nowhere states, however, that retroactivity is limited to a direct effect on a party. Rather, as the Court earlier stated, "[e]lementary considerations of fairness dictate that *individuals* should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 1497 (emphasis added); *see also id.* at 1500 (discussing "unfairness of imposing new burdens on *persons* after the fact")(emphasis added); *Chappell v. Gomez*, C93-4421 FMS (N.D. Cal. August 8, 1996) (finding retroactive effect of new legislation upon non-party attorney).

[9] We note that legislation affecting relief that is "prospective" is not generally considered to have genuinely retroactive effects. *Landgraf*, 114 S.Ct. at 1501 (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 42 S.Ct. 72 (1921)). The question, here, however, is not whether the orders at issue are "prospective" but whether they constitute "relief."

While the retroactive effects of section 802(a)(f)(4) in the case at bar may not be traditional (given the unusual nature of the provision), they are no less real. The Court appointed the Special Master to undertake a tremendously demanding task in a very complex case involving numerous, and sometimes novel, remedial issues. Indeed, this Court's experience with the remedial process to date has only served to further demonstrate the difficulty and extent of the challenges facing the Special Master in this case. The Special Master accepted this assignment in January 1995 on the representation that he would be compensated at an hourly rate of $125.00 per hour. As of the date of this order, he has devoted close to 18 months to assisting defendants to formulate and implement relief for the plaintiff class. It is also clear to the Court that it could not ask for a more experienced, diligent, and conscientious Special Master.

The gross unfairness of depriving the Special Master – ex post facto – of the benefit of the Court's representation and order, and slashing his compensation 40 percent many months into the remedial process is self-evident. The drastic change in pay also plainly changes the legal consequences of the Special Master's acceptance of, and appointment to, his position long after the fact, and long after he has committed himself morally and professionally to completing the task undertaken. Under these circumstances, we have little doubt that section 802(a)(f)(4) is genuinely retroactive in any fair sense of the word. As such, "sound considerations of general policy and practice". . . . and "long held and widely shared expectations about the usual operation of legislation," *id.* at 1508,

strongly argue against the retrospective application of section 802(a)(f)(4) in this particular instance.[10]

Shifting the cost of the Special Mastership from defendants to the judiciary is also retroactive in nature. This unprecedented aspect of section 802(a)(f)(4) relieves a culpable litigant of a significant financial burden required to cure its own constitutional violations, and instead imposes that obligation upon the federal courts. As such, the provision fundamentally alters the legal consequences – for the judiciary – of this Court's prior finding of liability, for the Court has little choice but to continue the Special Mastership. Any other action would constitute an abdication of this Court's responsibility to ensure that defendants formulate and implement full relief for the plaintiff class.

Defendants emphasize that they are "not aware of any case finding such judicial interests cognizable for purposes of determining a statute's retroactivity." Defs' Memorandum at 9. We do not find this observation dispositive, however, since this appears to be the first time that Congress has imposed what is normally considered a responsibility of the losing party upon the judiciary – and

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[10] We further note that while the Court did not enter into a formal contract with the Special Master, the Special Master's agreement to undertake the appointment and to do so at a specific hourly rate is contractual in nature. As the Supreme Court observed in *Landgraf*, courts have been particularly reluctant to permit new legislation to disturb contractual rights. *See Landgraf*, 114 S.Ct. at 1500 (noting that application of presumption against retrospectivity is most commonly found in cases which "affect[ ] contractual or property rights, matters in which predictability and stability are of prime importance").

the first time such a party has sought retrospective application of such a provision.

The transfer of the cost of the Special Mastership at this juncture not only imposes a substantial new burden on the judiciary for its previous decisions, but it also injects uncertainty into an on-going remedial process and alters its existing balance. While the Court has been informed that some federal funds are currently available, there is clearly no guarantee that those funds will continue to be forthcoming or will not be subject to restrictions that may significantly impair the Court's ability to effectuate full and effective relief. Of course any such impairment would also interfere with the plaintiffs' rights to such relief. Completely relieving defendants of any obligation to bear the cost of the Special Mastership may also undermine incentives to proceed efficiently and may even provide contrary incentives to delay.

Given the above, we are persuaded that applying section 802(a)(f)(4) to this case in the midst of the remedial process would result in genuine retroactive effects. Thus, to the extent that the term "relief" is ambiguous, we conclude that our original interpretation should still prevail. To hold otherwise and adopt defendants' interpretation would permit section 802(a)(f)(4) to operate retroactively in this case without any evidence of Congressional intent favoring such a result.[11] Such an outcome clearly runs afoul of the "long held and widely

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[11] As defendants concede,"the legislative history provides no clear answer [as to the retrospective application of the master's fees provisions]." Defs' June 18, 1996 Memorandum at 8. Indeed, the type of retroactive effects discussed above may have dissuaded Congress from expressing any clear intent on

shared expectations about the usual operation of legislation" that underlay the presumption against retroactive legislation. *Landgraf,* 114 S.Ct. at 1508.[12]

CONCLUSION

In sum, Congress has expressly limited the retrospective reach of the PLRA to orders providing prospective "relief." For all of the reasons set forth above, we conclude that this Court's January 23, 1995 order setting the

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the issue. It is also worth noting that although Congress was well aware of an Arizona statute that prohibited payment to already-appointed special masters, see 141 Cong. Rec. S14408-01, S 14418 (Sep. 27, 1995)(Statement of Senator Kyl), Congress did not follow the Arizona format. *Compare* section 802(a)(f)(4) of the PLRA *with* Arizona Rev. Stat. Ann. §§ 35-152 (A),(C), and (E) (subsequently invalidated on supremacy grounds in *Hook v. Arizona,* 907 F.Supp 1326, 1338 (D. Ariz. 1995), *aff'd* 73 F.3d 369 (9th Cir. 1995)(table)).

[12] It is also well settled that where a particular interpretation of a statute would raise serious constitutional issues, the court "must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the statute in question]." *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Construction,* 108 S.Ct. 1392, 1399 (1988); *see also Landgraf,* 114 S.Ct. at 1498, n.21 ("In some cases, however, the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application"). Here, plaintiffs contend that construing the PLRA to make section 802(a)(f)(4) applicable to this case would raise serious constitutional questions regarding separation of powers and equal protection. Thus, plaintiffs argue, the rule enunciated in *DeBartolo supra* provides an additional basis for rejecting retrospective application of section 802(a)(f)(4). We need not reach this issue, however, given our resolution of the instant dispute on other grounds.

hourly rate of the Special Master and determining the party responsible for payment does not constitute "relief" for purposes of section 802(b) of the PLRA. Accordingly, section 802(a)(f)(4) of the PLRA, 18 U.S.C. § 3626(f)(4), does not apply retrospectively to this action.[13] Therefore, and good cause appearing, defendants' request to modify the Court's January 23, 1995 Order of Reference to conform to section 802(a)(f)(4) must be denied.

**IT IS SO ORDERED.**

DATED 8/23/96

/s/ Thelton E. Henderson
Thelton E. Henderson,
Chief Judge
United States District Court

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[13] Given that Congress provided an express command regarding the retrospective reach of the PLRA, it is not necessary to resort to the judicial default rules described earlier in this order. *See also Landgraf*, 114 S.Ct. at 1505. However, even assuming *arguendo* that Congress failed to provide an express command, and we were to resort to judicial default rules, the end result would not differ. For the same reasons discussed above, we would conclude that application of section 802(a)(f)(4) to this case would result in genuine retroactive effects. As such, the presumption against retrospective application applies absent clear congressional intent favoring such a result. *Id.* at 1505. Since, as defendants concede, there is no such evidence of "clear congressional intent," *see* Defs' June 18, 1995 memorandum at 8, with respect to section 802(a)(f)(4), the presumption applies and the provision may only be given prospective effect. *Landgraf*, 114 S.Ct at 1505.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RALPH COLEMAN, et al.,

Plaintiffs,

vs.

PETE WILSON, et al.,

Defendants.

_____/

No. CIV S-90-0520
LKK JFM P

ORDER OF
REFERENCE

(Filed Dec. 11, 1995)

On November 17, 1995, the magistrate judge filed findings and recommendations regarding a proposed order of reference of this matter to a special master. The findings and recommendations were served on all parties and contained notice to all parties that any objections to the findings and recommendations were to be filed within ten (10) days. On December 1, 1995, defendants filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, this court has conducted a *de novo* review of this case. Upon completion of said review, the court finds that one objection raised by defendants warrants further discussion and amendment of the order proposed by the magistrate judge.

Defendants object to the proposed order of reference insofar as it directs the special master to work jointly with counsel for plaintiffs and counsel for defendants in development of a remedial plan. Defendants propose that the special master be directed to work jointly with defendants and experts selected by the special master.

The principal responsibilities of the special master, as previously described by this court, are to provide expert advice to defendants to ensure that their decisions regarding the provision of mental health care to class members conforms to the requirements of the federal constitution and to advise the court regarding assessment of defendants' compliance with their constitutional obligations. (Order filed September 13, 1995, at 81-82 n.63.) Thus, the main work of the special master in developing a remedial plan will be with the defendants to this litigation, with due regard for both the constitutional deficiencies identified by the court and the deference owed to the discretion of prison administrators in the discharge of their duties.

Nonetheless, this remains an adversarial proceeding where both sides of the litigation are represented by counsel. All parties are entitled to the advice of counsel as this litigation proceeds. Therefore, while the special master will be directed to work with defendants, he will also be directed to consult with counsel for all parties as necessary in the discharge of his duties.[1]

This court has appointed J. Michael Keating, Jr. to serve as a neutral special master pursuant to Federal Rule of Civil Procedure 53 and the inherent powers of the court. The purpose of this appointment is to assist the

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[1] Counsel will be entitled to be heard in any proceeding before this court concerning the adoption of a remedial plan. The court, and the remedial process, will be greatly assisted if the special master has consulted with counsel and addressed their concerns, insofar as possible, prior to the time the proposed remedial plan is submitted to the court.

court in fulfilling its obligation to fashion a remedy for the constitutional violations in the delivery of mental health care to members of the plaintiff class and to monitor implementation of that remedy. The specific duties and powers of the special master, along with other terms of his appointment, are enumerated herein.

Good cause appearing therefore, the court hereby makes the following order of reference:

A. Duties of the Special Master

It is HEREBY ORDERED that the duties of the special master are and shall be limited to the following:

1. To work with defendants and experts to be selected by the special master in accordance with paragraph B(7), *infra*, to develop a remedial plan that effectively addresses the constitutional violations set forth in this court's September 13, 1995 order. In discharging this duty, the special master shall consult with counsel for plaintiffs and counsel for defendants as he deems necessary to the discharge of said duty.

2. To submit to the court within thirty (30) days of the date of this order, a proposed timeline for development of said remedial plan. In developing said timeline, the special master shall give due regard to the urgency of the problems to be remedied and the timelines recommended in the June 6, 1994 findings and recommendations.

3. To make interim reports to the court on the progress of the remedial plan.

4. To monitor defendants, implementation of and compliance with any remedial plan that this court may order. It is anticipated that the specific monitoring duties of the special master shall be developed in further detail once an appropriate remedial plan is fashioned and ordered by the court.

5. To prepare and file with the court periodic reports assessing defendants' compliance with such remedial plan as the court may order.

Prior to such filing, the special master shall serve, upon one designated representative of counsel for plaintiffs and one designated representative of counsel for defendants, a copy of each compliance report in draft form, and shall afford counsel a reasonable time within which to submit to the special master specific, written objections. Upon the request of either party, submitted in conjunction with the specific written objections, the special master shall, after giving reasonable notice to counsel, convene a hearing at which time he shall fully consider the written objections of the parties. Thereafter, the special master shall serve and file his compliance report with the court in accordance with Federal Rule of Civil Procedure 53(e)(1).

6. To advise the court concerning any modification to the remedial plan that is requested by a party or that appears necessary to effectuate the purposes of the remedial plan.

7. The duties set forth herein may be further specified, expanded or modified only by order of this court.

B. Powers of the Special Master

IT IS FURTHER ORDERED that the powers of the special master are and shall be limited to the following:

1. To enter, at any reasonable time, with or without advance notice, any part of any facility at any California Department of Corrections (CDC) institution except the San Quentin State Prison, the Northern Reception Center at Vacaville and the California Medical Facility – Main at Vacaville.

2. To interview, on a confidential basis or otherwise, correctional staff, employees, and appointees of the CDC for the purpose of performing his duties under this Order of Reference. Defendants shall provide suitable facilities and arrange for such interviews to be conducted under conditions satisfactory to the special master. In addition, the special master may engage in informal conferences with CDC staff, employees, and appointees, and such persons shall cooperate with the special master and respond to inquiries and requests related to the performance of his duties, including requests for the compilation or communication of oral or written information.

3. To interview, confidentially or otherwise, inmates housed at any CDC institution, except the San Quentin State Prison, the Northern Reception Center at Vacaville and the California Medical Facility-Main at Vacaville, as may be necessary to perform his duties under this Order of Reference. Such interviews shall be held at the institution where the inmate is incarcerated.

4. To attend formal institutional meetings and proceedings at CDC headquarters or at any CDC institution

except the San Quentin State Prison, the Northern Reception Center at Vacaville and the California Medical Facility-Main at Vacaville as may be necessary to perform his duties under this Order of Reference.

5. To have unlimited access to the records, files and papers maintained by defendants to the extent that such access is related to the performance of the special master's duties under this Order of Reference. Such access shall include all departmental, institutional, and inmate records, including but not limited to, central files, medical records, and mental health records. The special master may obtain copies of all such relevant records, files, and papers.

6. To require the posting of notices in any part of any institution in the class in such number and form as the master may direct to the extent that such notices are necessary and appropriate to effectuate an effective remedy.

7. To retain or employ independent experts, specialists, assistants, administrative support staff or any other such person whose advice or assistance the special master deems necessary to the effective fulfillment of his duties under this Order of Reference. All such persons, as well as the nature of their compensation, shall be approved by the court in advance of their retention or employment.

8. To hold and conduct hearings with respect to defendants' implementation and compliance with such remedial plan as this court may order. To this end, the special master shall have the power to require the attendance of material witnesses, including prisoners confined by the CDC, the defendants, and any employees or

appointees of the CDC, and the special master shall exercise all other powers described in subsection (c) of Rule 53 of the Federal Rules of Civil Procedure.

9. The powers described herein may only be modified by order of this court.

10. In exercising the powers enumerated herein, the special master may act by himself or through employees of, or assistants to, the special master approved by the Court. All actions of such assistant(s) or employee(s) shall be supervised and coordinated by the special master in order to accomplish the objectives of this reference.

11. The special master shall not be empowered to direct defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance. The sole power to direct compliance and punish noncompliance remains with the court. Neither the special master nor anyone in his employ shall intervene in the administrative management of the CDC or any of the institutions that are part of the class in the instant action.

C. Compliance Reports

IT IS FURTHER ORDERED that any compliance report of the special master filed in accordance with paragraph A(5) above shall be adopted as the findings of fact and conclusions of law of the court unless, within ten days after being served with the filing of the report, either side moves to reject or modify the report. The court will entertain no objection to the report unless an identical objection was previously submitted to the special master in the form of a specific written objection in

accordance with the provisions of paragraph A(5) above. The objecting party shall note each particular finding or recommendation to which objection is made, shall provide proposed alternative findings or recommendations, and may request a hearing before the court. Pursuant to Fed. R. Civ. P. 53(e)(2), the court shall accept the special master's findings of fact unless they are clearly erroneous.

D. Compensation of the Special Master

IT IS FURTHER ORDERED that the special master shall be compensated at a reasonable hourly rate of one hundred fifty dollars ($150.00) per hour for services performed in accordance with this order, except that he shall be compensated at the rate of seventy-five dollars ($75.00) per hour for travel time. All reasonable expenses incurred by the special master in performing his duties under this order shall be reimbursed as costs of the mastership.

The special master's fees and expenses shall be borne by the defendants as part of the costs of this action. Defendants are hereby ordered to deposit, within thirty (30) days of the date of this Order, the sum of two hundred fifty thousand dollars ($250,000.00) with the Clerk of the Court as an interim payment of costs, which amount shall be invested in an interest-bearing account. All interest earned in the account shall accrue to the benefit of defendants. The special master shall periodically submit to the Clerk of the Court, with a copy to defendants' designated representative, an itemized statement of the special master's fees and expenses, which

shall be payable on receipt. At such point that the above sum is substantially drawn down, the court may order defendants to deposit additional sums with the Clerk of the Court.

DATED: December 11, 1995.

/s/ Lawrence K. Karlton
UNITED STATES
DISTRICT JUDGE

**EXHIBIT E**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RALPH COLEMAN, et al.,

NO. CIV. S-90-520 LKK

Plaintiffs,

v.

PETE WILSON, etc., et al.,

Defendants.

_____/

JAY LEE GATES, et al.,

NO. CIV. S-87-1636 LKK

Plaintiffs,

v.

**ORDER**

JAMES GOMEZ, et al.,

(Filed May 09, 1996)

Defendants.

_____/

The court has heretofore appointed a mediator and special masters in both of the above captioned cases, and has ordered payment to them and to those hired by them to aid in performance of their duties. The passage of the Prison Litigation Reform Act of 1995 may effect the viability of those orders. *See* Prison Litigation Reform Act ("Act") § 802(f) (4) (apparently providing, inter alia, that special masters may be compensated only at the rate provided under 18 U.S.C. § 3006A, and that such remuneration "shall be paid with funds appropriated to the Judiciary."). The statute raises questions about the current payment plan for the mediators/special masters in *Gates*

and *Coleman*, and also about the availability of additional experts hired by these mediators/masters to assist them in their duties, including developing remedial plans, conducting hearings and preparing proposed findings of fact. *See* Act § 802(f)(6) (A), (C) and (D).[1]

Accordingly, in order to determine whether these sections of the Act are applicable to the instant cases, and if so, what effect the Act has on these cases, the court hereby SETS the following briefing schedule and ORDERS as follows:

1. All parties shall submit briefs addressing:

A. The impact of section 802(f) (4) on the special masters/mediators and their staffs;

B. Whether the section is applicable if no federal funds are available;

C. Whether the statute may be applied if it impairs the courts duty to enforce the provisions of the constitution;

2. A hearing is NOW SET on June 17, 1996, at 2:00 p.m.;

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[1] An order has been issued by one district court in the District of Columbia temporarily resolving the problem of the applicability of section 802(f) by defining the previously appointed special master as an expert witness pursuant to Fed. R. Evid. 706, rather than a special officer pursuant to Fed. R. Civ. P. 53. *See Inmates of Three Lorton Facilities, et al. v. District of Columbia, et al.*, No. 92 – 1208 (U.S. Dist. Ct. for the District of Columbia) (Proposed Order Attached). The court expresses no opinion as to the propriety of such a resolution and invites briefing on the issue.

3. Defendants shall file and serve their brief by fax on plaintiffs' counsel no later than May 24, 1996;

4. Plaintiffs shall file and serve their brief by fax on defendants' counsel no later than May 31, 1996;

5. Defendants' reply brief, if any, shall be filed on June 7, 1996.

IT IS SO ORDERED.

DATED: May 9, 1996.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES
DISTRICT COURT

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| JOHN DOE, *et al.*,<br>Plaintiffs<br>v.<br>DISTRICT OF COLUMBIA, *et al.*,<br>Defendants. | Civil Action No. 79-1726<br>(Judge June L. Green) |
| TWELVE JOHN DOES, *et al.*,<br>Plaintiffs,<br>v.<br>DISTRICT OF COLUMBIA, *et al.*,<br>Defendants. | Civil Action No. 80-2136<br>(Judge June L. Green) |
| INMATES of the MODULAR FACILITY, *et al.*,<br>Plaintiffs,<br>v.<br>DISTRICT OF COLUMBIA, *et al.*,<br>Defendants. | Civil Action No. 90-0727<br>(Judge June L. Green) |

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|---|---|
| INMATES OF OCCOQUAN, *et al.*, Plaintiffs, v. MARION S. BARRY, JR., *et al.*, Defendants. | Civil Action No. 86-2128 (Judge June L. Green) |
| INMATES OF THREE LORTON FACILITIES, *et al.*, Plaintiffs, v. DISTRICT OF COLUMBIA, *et al.*, Defendants. | Civil Action No. 92-1208 (Judge June L. Green) (Filed Apr 30, 1996) |

**ORDER**

Upon consideration of Plaintiffs' Emergency Motion for the Court Appointment of Grace M. Lopes as an Expert Witness Under Federal Rule of Evidence 706, and any opposition thereto, it is hereby

ORDERED that the motion is GRANTED. Pursuant to Federal Rule of Evidence 706, the Court appoints Grace M. Lopes as an expert witness, effective immediately. The Court finds that Ms. Lopes is qualified by education and experience to provide expert opinion concerning defendants' compliance with the Court's Orders in these cases. The Court finds that Ms. Lopes' services are necessary to

aid the Court in implementing and monitoring compliance with the Court's Orders in the above-captioned cases. It is

FURTHER ORDERED that the Orders of the Court appointing Ms. Lopes as the Special Officer of the Court pursuant to Fed. R. Civ. P. 53 are hereby stated, pending further Order of the Court. It is

FURTHER ORDERED that Ms. Lopes shall assist the Court in monitoring Defendants' compliance with the Court's Orders in these matters, and shall report to the Court concerning the state of Defendants' compliance and the factors that affect compliance. The actions of Ms. Lopes and any staff or consultants hired by Ms. Lopes shall be under the control and supervision of the Court. The duties of Ms. Lopes will be to observe, monitor, make recommended findings of fact, report or testify as to her findings, and make recommendations to the Court and to the parties concerning steps that should be taken to achieve compliance with the Court's Orders. Ms. Lopes should endeavor to assist Defendants in achieving compliance in whatever way possible, and should confer informally with the parties on matters affecting compliance. Ms. Lopes shall have the following specific powers and duties:

1. Ms. Lopes shall be paid a fee of $85.00 per hour, plus expenses, unless otherwise ordered by the Court. Such fees and expenses shall be paid by the District of Columbia. She shall be available to perform her duties as the needs of the Court require;

2. Ms. Lopes shall be granted access by Defendants to the facilities and records of the District of Columbia

Department of Corrections and the government of the District of Columbia, to the extent necessary to permit Ms. Lopes to monitor and report fully on Defendants' compliance with the Court's Orders;

3. Ms. Lopes shall be authorized to employ such additional experts or consultants as are reasonably necessary to assist her in monitoring and reporting on Defendants' compliance with the Court's orders. She shall notify counsel for Defendants, at least two weeks in advance, of her intention to employ any such additional expert or consultant and of the rates to be charged by the additional expert or consultant and, to the extent possible, the approximate fees and expenses to be paid. The defendants shall have the opportunity to discuss or object to such employment of additional experts or consultants. In the event of a continued disagreement between Defendants and Ms. Lopes concerning her employment of any additional expert or consultant, Defendants shall have the opportunity to file a motion with the Court asking that such employment not be authorized. In the event that Defendants do not file such a motion within two weeks of receipt of notice from Ms. Lopes of her intent to employ an additional expert or consultant, she shall be deemed authorized to employ such additional expert or consultant. The fees and expenses of any additional expert or consultant hired by Ms. Lopes pursuant to this paragraph shall be paid by the District of Columbia, and any such additional expert or consultant shall be granted access to the records and facilities of Defendants to the extent necessary to assist Ms. Lopes in monitoring the compliance of Defendants with the Court's Orders;

4. Ms. Lopes shall be authorized to employ investigative assistants to assist her in factfinding and investigations concerning Defendants' compliance. The investigative assistants shall be granted access to the records and facilities of Defendants to the extent necessary to assist Ms. Lopes in monitoring the compliance of Defendants. The fees of the investigative assistants shall not exceed $60.00 per hour. The fees and expenses of the investigative assistant shall be paid by the District of Columbia;

5. Ms. Lopes shall submit applications to the Court for payment of her fees and expenses, accounting for the amount of payment requested. Such payment shall be made from the fund maintained in the Court's registry, which was established pursuant to this Court's earlier order. This fund is maintained to permit the prompt payment of the fees and expenses of Ms. Lopes, the investigative assistants, and any additional experts or consultants employed by Ms. Lopes pursuant to paragraph three. The Court shall direct the Clerk to make appropriate payment from the fund in the Court's registry, and the Court shall further direct Defendants to make payment to the registry to replenish the fund;

6. Defendants shall continue to provide Ms. Lopes with office space and with secretarial support, as needed. Office equipment and furnishings shall be provided Ms. Lopes, and shall become the property of the District of Columbia upon the termination of her appointment;

7. Ms. Lopes, the investigative assistants, and any additional experts or consultants employed by her shall have the right to conduct confidential interviews with

officials and staff of the District of Columbia Department of Corrections. Ms. Lopes shall be authorized to confer and to correspond with either Plaintiffs or Defendants on an ex parte basis;

8. Ms. Lopes shall have the power to require reports by the parties concerning matters affecting compliance with the Court's Orders;

9. Ms. Lopes shall file regular reports with the Court on the state of Defendants' compliance with the Decrees, and on the factors that affect such compliance, and may recommend actions to be taken by the Court to improve such compliance. Ms. Lopes shall submit her reports in draft form to the parties for comment, and shall preserve the confidentiality of such draft reports. The parties shall submit any comments on the draft reports within ten days of their receipt. Thereafter, Ms. Lopes shall submit her final reports promptly to the Court and serve them upon the parties.

10. Ms. Lopes shall review proposals for disbursement of the funds accumulated from contempt fines imposed in these cases, and shall recommend appropriate expenditures to the Court.

11. Ms. Lopes shall exercise those powers assigned to the Special Officer of the Court by the Court's previous Orders, consistent with the powers granted to Ms. Lopes as an expert witness herein. It is

FURTHER ORDERED that, on or before 12:00 noon on May 15, 1996, Defendants shall file and hand serve their response to Plaintiffs' motion for appointment of Ms. Lopes as an expert pursuant to Rule 706 . Plaintiffs

shall file and hand serve their reply thereto by 2:00 p.m. on May 16, 1996. The Court will hear argument on the motion at 4:00 p.m. on May 16, 1996.

SO ORDERED.

/s/ June L. Green
June L. Green
United States District Judge

Dated: April 29, 1996

United States District Court
for the
Eastern District of California
May 9, 1996

* * CERTIFICATE OF SERVICE * *

2:90-cv-00520

Coleman

v.

Reagan

---

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 9, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Donald Specter SJ/LKK
Prison Law Office
General Delivery
San Quentin, CA 94964

Michael W Bien
Rosen Bien and Asaro
155 Montgomery Street
Eighth Floor
San Francisco, CA 94104

Bruce Michael Slavin
Attorney General's Office of
the State of California
50 Fremont Street
Suite 300
San Francisco, CA 94105-2239

J Michael Keating Jr
Christopher H Little & Associates
50 S Main St
Providence, RI 02903

---

**EXHIBIT F**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RALPH COLEMAN, et al.,
Plaintiffs,
vs.
PETE WILSON, et al.,
Defendants.
/

No. CIV S-90-0520 LKK JFM P

ORDER

(Filed Jul. 19, 1996)

By order filed December 11, 1995, this court entered an order referring this matter to a special master and directing that the special master's fees and expenses be borne by the defendants as part of the costs of this action. In the December 11, 1995 order, the court directed defendants to deposit the sum of $250,000.00 with the Clerk of the Court, said amount to be invested in an interest-bearing account. A substantial part of those funds have now been expended and a significant amount of work remains to be done by the special master.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that:

1. Within thirty days of the date of this order defendants shall deposit with the Clerk of the Court a second interim payment of costs in the amount of $250,000.00 which amount shall be invested in the interest-bearing account previously opened for this action; and

2. The Clerk of the Court is directed to serve a copy of this order on the Financial Department of this Court.

DATED: 7/18/96

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT
COURT

United States District Court
for the
Eastern District of California
July 19, 1996

* * CERTIFICATE OF SERVICE * *

2:90-cv-00520

Coleman

v.

Reagan

---

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 19, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Donald Specter
Prison Law Office
General Delivery
San Quentin, CA 94964

SJ/LKK

CF/JFM

Financial Department USDC

Michael W Bien
Rosen Bien and Asaro
155 Montgomery Street
Eighth Floor
San Francisco, CA 94104

Bruce Michael Slavin
Attorney General's Office of the State of California
50 Fremont Street
Suite 300
San Francisco, CA 94105-2239

J Michael Keating Jr
Christopher H Little & Associates
50 S Main St
Providence, RI 02903

Edmund F Brennan
United States Attorney
650 Capitol Mall
Sacramento, CA 95814

Jack L. Wagner, Clerk
BY: /s/ K Carlos
K Carlos, Deputy Clerk

**EXHIBIT G**

DANIEL E. LUNGREN, Attorney General
Of the State of California
PETER J. SIGGINS
Senior Assistant Attorney General
BRUCE M. SLAVIN, State Bar No. 115192
Deputy Attorneys General
50 Fremont Street, Suite 300
San Francisco, CA 94105-2239
Telephone No. (415) 356-6048

Attorneys for Defendants Wilson, Sandoval, Gomez, Khoury and Zil

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| RALPH COLEMAN, et al., Plaintiffs, v. JAMES GOMEZ, et al., Defendants | No. CIV-S-90-0520 LKK JFM NOTICE OF APPEAL |

NOTICE IS HEREBY GIVEN THAT:

Defendants Pete Wilson, Joseph Sandoval, James Gomez, Nadim Khoury, M.D. and John Zil, M.D. appeal the permanent injunction entered in this action on September 13, 1995, to the United States Court of Appeal for the Ninth Circuit.

DATED: October 11, 1995

Respectfully submitted,

DANIEL E. LUNGREN, Attorney
General of the State of California

PETER J. SIGGINS
Senior Assistant Attorney General

/s/ Bruce M. Slavin

BRUCE M. SLAVIN
Deputy Attorneys General

Attorneys for Defendants Wilson, Sandoval, Gomez, Khoury and Zil

**DECLARATION OF SERVICE BY MAIL**

Case Name: *Ralph Coleman v. P. Wilson, et al.*
USDC-ED No. *CIV S 90-0520 LKK-JFM*

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 11, 1995, I placed the attached

NOTICE OF APPEAL

in the internal mail collection system at the Office of the Attorney General, 50 Fremont Street, Suite 300, San Francisco, California 94105-2239, for deposit in the United States Postal Service that same day in the ordinary course

of business, in a sealed envelope, postage fully postpaid, addressed as follows:

DONALD SPECTER
ALLISON HARDY
PRISON LAW OFFICE
GENERAL DELIVERY
SAN QUENTIN, CA
94964

MICHAEL W. BIEN
ROSEN, BIEN & ASARO
155 MONTGOMERY
STREET, 8TH FLOOR
SAN FRANCISCO, CA
94104

HELLER, EHRMAN, WHITE & McAULIFFE
RICHARD L. GOFF
333 BUSH STREET
SAN FRANCISCO, CA 94104

WARREN E. GEORGE
McCUTCHEON, DOYLE, BROWN & ENERSEN
THREE EMBARCADERO CENTER
SAN FRANCISCO, CA 94111

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 11, 1995 at San Francisco, California.

C. VILLALON

/s/ C. Villalon
Signature

**EXHIBIT H**

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| RALPH COLEMAN, et al., Plaintiffs-Appellees, v. PETE WILSON, et al., Defendants-Appellants, | NO. 95-17039<br>D.C. NO. CV-90-00520-LKK<br>MEMORANDUM*<br>(Filed Nov. 14, 1996) |

Appeal from the United States District Court
for the Eastern District of California
Lawrence L. Karlton, District Judge Presiding

Argued and Submitted
October 7, 1996
San Francisco, California

Before: FLETCHER AND FERGUSON, Circuit Judges and KING, ** District Judge

California Governor Pete Wilson and various California prison officials appeal a district court ruling related to a preliminary injunction requiring them to implement a plan to protect a class of state prisoners who suffer from serious mental disorders and take psychotropic medications from exposure to extreme heat. The district court

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

did not issue a final order in this matter and as a result this appeal is dismissed for lack of subject matter jurisdiction.

I.

The district court, in its review of a systemic challenge to the provision of mental health care services to prisoners in institutions within the California Department of Corrections, expressed its agreement with the recommendation of the magistrate judge to make permanent for three years a stipulated preliminary injunction. This stipulated preliminary injunction requires appellants to implement "heat plans" to protect certain inmates from excessive exposure to heat.

The district court adopted the magistrate judge's Findings and Recommendations with "said recommendations to be implemented *by subsequent order of the court.*" *Coleman v. Wilson*, 912 F. Supp. 1282, 1324 (E.D. Cal. 1995) (emphasis added). Consistent with the interim nature of its ruling, the court denied the defendants' (the state's) motion for judgment pursuant to Federal Rule of Civil Procedure 52(c) and denied a stay pending appeal as premature. We agree that this appeal is simply premature. There is no final order.

II.

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). "The foundation of

this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation." *Catlin v. United States*, 324 U.S. 229, 233-34 (1945). While 28 U.S.C. § 1292 (a) (1) provides an exception to the final judgment rule and permits appeal from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions," this exception does not apply to the case at hand because no order has been issued.

This court held in *Orange County v. HongKong and Shanghai Banking Corp.*, 52 F.3d 821 (9th Cir. 1995), that "[i]n determining whether an order has the practical effect [under § 1292 (a)(1)] of granting or denying an injunction, we look to its substantial effect rather than its terminology." *Id.* at 825 (citations and internal quotations omitted). Viewed in light of the essential attributes of an injunction, the district court's opinion does not have the effect of an injunction.[1]

At best, the district court's opinion indicates its intention to keep in place, in an order yet to be entered, the stipulated preliminary injunction that, by its terms, was to last until further order of the court, to be based on agreement of the parties or trial. *See Public Service Company of Colo. v. Batt*, 67 F.3d 234 (9th Cir. 1995).

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[1] "The fundamental characteristics of an injunction are that it is (1) 'directed to a party,' (2) 'enforceable by contempt,' and (3) 'designed to accord or protect 'some or all of the substantive relief sought by a complaint' in more than a preliminary fashion.' " *Id.* (citing 16 Charles A. Wright et al., Federal Practice and Procedure § 3922 at 29 (1977) (internal citations omitted)).

Because the district court's opinion is not an appealable order, this appeal is dismissed for lack of subject matter jurisdiction.

**EXHIBIT I**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| ALEJANDRO MADRID, et al., on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>JAMES GOMEZ, Director, California Department of Corrections, et al.,<br><br>Defendants. | NO. C90-3094-TEH<br>CLASS ACTION<br>ORDER OF REFERENCE<br>(Filed Jan. 23, 1995) |

On January 10, 1995, this Court appointed Thomas F. Lonergan to serve as a neutral Special Master pursuant to Federal Rule of Civil Procedure 53 and the inherent powers of the Court. *See* January 10, 1995 Findings of Fact, Conclusions of Law, and Order at 342. As explained therein, the purpose of this appointment is to assist the Court in fulfilling its obligation to fashion an appropriate remedy and to monitor the implementation of that remedy. *Id.* The Court further stated that the specific duties and powers of the Special Master, along with other terms of his appointment, would be governed by a separate order of reference to be issued forthwith. *Id.*

Accordingly, and good cause appearing, the Court hereby makes the following order of reference:

A. Duties of the Special Master

It is HEREBY ORDERED that the duties of the Special Master are and shall be limited to the following:

1. To work jointly with counsel for plaintiffs and defendants to develop a remedial plan that effectively addresses the constitutional violations set forth in the Court's conclusions of law filed January 10, 1995. The Special Master's duties concerning the specific process for developing such plan, described in this Court's order of January 10, 1995 at 342-44, are incorporated herein.[1]

2. To monitor defendants' implementation of and compliance with any remedial plan that this Court may order. It is anticipated that the specific monitoring duties of the Special Master shall be developed in further detail once an appropriate remedial plan is fashioned and ordered by this Court.

3. To prepare and file with the Court periodic reports assessing defendants' compliance with such remedial plan as this Court may order.

Prior to such filing, the Special Master shall serve, upon one designated representative of counsel for plaintiffs and one designated representative of counsel for defendants, a copy of each compliance report in draft form, and shall afford counsel a reasonable time within which to submit to the Special Master specific, written objections. Upon the request of either party, submitted in

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[1] The Special Master may provide the 30-day progress reports referred to at page 343 in either written or oral form.

conjunction with the specific written objections, the Special Master shall, after giving reasonable notice to counsel, convene a hearing at which time he shall fully consider the written objections of the parties. Thereafter, the Special Master shall serve and file his compliance report with the Court in accordance with Federal Rule of Civil Procedure 53(e)(1).

4. To advise the Court concerning any modification to the remedial plan that is requested by a party or that appears necessary to effectuate the purposes of the remedial plan.

5. The duties set forth herein may be further specified, expanded or modified only by stipulation of the parties or order of this Court.

6. The Special Master shall not be empowered to direct defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance. The sole power to direct compliance and to punish noncompliance remains with the Court. Neither the Special Master nor anyone in his employ shall intervene in the administrative management of Pelican Bay State Prison ("Pelican Bay").

B. Powers of the Special Master

IT IS FURTHER ORDERED that the powers of the Special Master are and shall be limited to the following:

1. To enter, at any reasonable time, with or without advance notice, any part of any facility at Pelican Bay.

2. To interview, on a confidential basis or otherwise, correctional staff, employees, and appointees of the California Department of Corrections ("CDC") for the purpose of performing his duties under this Order of Reference. Defendants shall provide suitable facilities and arrange for such interviews to be conducted under conditions satisfactory to the Special Master. In addition, the Special Master may engage in informal conferences with CDC staff, employees, and appointees, and such persons shall cooperate with the Special Master and respond to inquiries and requests related to the performance of his duties, including requests for the compilation or communication of oral or written information.

3. To interview, confidentially or otherwise, inmates at Pelican Bay as may be necessary to perform his duties under this Order of Reference. Such interviews shall be held at Pelican Bay.

4. To attend formal institutional meetings and proceedings at Pelican Bay as may be necessary to perform his duties under this Order of Reference.

5. To have unlimited access to the records, files and papers maintained by defendants to the extent that such access is related to the performance of the Special Masters' duties under this Order of Reference. Such access shall include all departmental, institutional, and inmate records, including but not limited to, central files, medical records, and mental health records. The Special Master may obtain copies of all such relevant records, files, and papers.

6. To require the posting of notices in any part of any facility at Pelican Bay in such number and form as

the Master may direct to the extent that such notices are necessary and appropriate to effectuate an effective remedy.

7. To retain or employ independent experts, specialists, assistants, administrative support staff or any other such person whose advice or assistance the Special Master deems necessary to the effective fulfillment of his duties under this Order of Reference. All such persons, as well as the nature of their compensation, shall be approved by the Court in advance of their retention or employment.

8. To hold and conduct hearings with respect to defendants' implementation and compliance with such remedial plan as this Court may order. To this end, the Special Master shall have the power to require the attendance of material witnesses, including prisoners confined by the CDC, the defendants, and any employees or appointees of the CDC, and the Special Master shall exercise all other powers described in subsection (c) of Rule 53 of the Federal Rules of Civil Procedure.

9. The powers described herein may be modified pursuant to a stipulation of the parties or an order of this Court.

10. In exercising the powers enumerated herein, the Special Master may act by himself or through employees of, or assistants to, the Special Master approved by the Court. All actions of such assistant(s) or employee(s) shall be supervised and coordinated by the Special Master in order to accomplish the objectives of this reference.

C. Compliance Reports

IT IS FURTHER ORDERED that any compliance report of the Special Master filed in accordance with ¶ A(3) above shall be adopted as the findings of fact and conclusions of law of the Court unless, within ten days after being served with notice of the filing of the report, either side moves to reject or modify the report. The Court will entertain no objection unless an identical objection was previously submitted to the Special Master in the form of a specific written objection in accordance with the provisions of ¶ A(3) above. The objecting party shall note each particular finding or recommendation to which objection is made, shall provide proposed alternative findings or recommendations, and may request a hearing before the Court. Pursuant to Fed. R. Civ. P. 53(e)(2), the Court shall accept the Special Master's findings of fact unless they are clearly erroneous.

D. Compensation of the Special Master

IT IS FURTHER ORDERED that the Special Master shall be compensated at a reasonable hourly rate of One Hundred and Twenty-Five dollars ($125.00) per hour for services performed in accordance with this Order. This rate is consistent with the compensation that the Special Master named herein has earned for similar work. All reasonable expenses incurred by the Special Master in performing his duties under this Order shall be reimbursed as costs of the mastership.

The Special Master's fees and expenses shall be borne by defendants as part of the costs of this action. Defendants are hereby ordered to deposit, within 30 days

of the date of this Order, the sum of One Hundred Fifty Thousand Dollars ($150,000.00) with the Clerk of this Court as an interim payment of costs, which amount shall be invested in an interest-bearing account. All interest earned in the account shall accrue to the benefit of defendants. The Special Master shall periodically submit to the Clerk of the Court, with a copy to defendants' designated representative, an itemized statement of the Special Master's fees and expenses, which shall be payable upon receipt. At such point that the above sum is substantially drawn down, the Court may order defendants to deposit additional sums with the Clerk of the Court.

IT IS SO ORDERED.

DATED 1/23/95 /s/ Thelton E. Henderson
Thelton E. Henderson,
Chief Judge
United States District Court

**EXHIBIT J**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| ALEJANDRO MADRID, et al., on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>JAMES GOMEZ, Director, California Department of Corrections, et al.,<br><br>Defendants. | NO. C90-3094-TEH<br>CLASS ACTION<br>ORDER<br>(Filed Jun. 1, 1995) |

The Court has been informed by the Special Master that the initial funds deposited by defendants to cover the expenses of the Special Master and retained experts and staff have been depleted to $13,174.12. This amount will not permit completion of the remedial and monitoring process required by this Court's January 10, 1995 decision. Accordingly, and good cause appearing, it is HEREBY ORDERED that defendants shall, within 21 days of the date of this Order, deposit an additional $150,000 into the Court account established by this Court's January 10, 1995 decision.

IT IS SO ORDERED.

DATED 6/1/95

/s/ Thelton E. Henderson
Thelton E. Henderson,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| ALEJANDRO MADRID, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. JAMES GOMEZ, Director, California Department of Corrections, et al., Defendants. | NO. C90-3094-TEH<br>CLASS ACTION<br>ORDER<br>(Filed Nov. 15, 1995) |

The Court has been informed by the Special Master that the funds deposited by defendants to cover the expenses of the Special Master and retained experts and staff have almost been depleted. The current balance will not permit completion of the remedial and monitoring process required by this Court's January 10, 1995 decision. Accordingly, and good cause appearing, it is HEREBY ORDERED that defendants shall, within 21 days of the date of this Order, deposit an additional $150,000 into the Court account established by this Court's January 10, 1995 decision.

IT IS SO ORDERED.

DATED 11/15/95

/s/ Thelton E. Henderson
Thelton E. Henderson,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| ALEJANDRO MADRID, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. JAMES GOMEZ, Director, California Department of Corrections, et al., Defendants. | NO. C90-3094-TEH<br>CLASS ACTION<br>ORDER<br>(Filed Mar. 20, 1994) |

The Court has been informed that the funds deposited by defendants to cover the expenses of the Special Master and retained experts and staff will be depleted with the latest (March 15, 1996) billing by the Special Master's experts and staff. As such, the current balance will not permit completion of the remedial and monitoring process required by this Court's January 10, 1995 decision. Accordingly, and good cause appearing, it is HEREBY ORDERED that defendants shall, within 21 days of the date of this Order, deposit an additional $150,000 into the Court account established by this Court's January 10, 1995 decision.

IT IS SO ORDERED.

DATED 3/20/96

/s/ Thelton E. Henderson
Thelton E. Henderson,
Chief Judge
United States District Court

**EXHIBIT K**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| ALEJANDRO MADRID, et al., on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>JAMES GOMEZ, Director, California Department of Corrections, et al.,<br><br>Defendants. | NO. C90-3094-TEH<br>CLASS ACTION<br>ORDER<br>(Filed May 2, 1996) |

In light of the passage of the Prison Litigation Reform Act of 1995, an issue has arisen regarding the payment of experts and staff that are or may be needed by the Special Master in order to carry out his responsibilities of assisting in the development of a remedy and the monitoring of remedial plans. Accordingly, and good cause appearing, it is HEREBY ORDERED that:

1. the parties shall appear for a hearing on Tuesday, May 21, 1996 at 3:00 p.m. to address:

(a) the impact of that portion of Section 802(f)(4) of the Act which provides that "Such compensation and costs [of Special Masters] shall be paid with funds appropriated to the Judiciary," on experts and staff of the Special Master, and

(b) if such provision governs the compensation of experts and staff, whether such provision is enforceable in the event federal funds are not made available.

2. Prior to said hearing, the parties shall submit written letter briefs addressing the above issues pursuant to the following schedule:

a. Defendants' opening letter brief: May 8, 1996
b. Plaintiffs' response: May 14, 1996
c. Defendants' reply: May 16, 1996

All briefs shall be served by fax on opposing counsel, and a copy shall be delivered to chambers at the time of filing. The parties shall *not* address any issue concerning the particular staffing or expert needs of the Special Master at this point or in the future.

IT IS SO ORDERED.

DATED 5/2/96

/s/ Thelton E. Henderson
Thelton E. Henderson,
Chief Judge
United States District Court

**EXHIBIT L**

PAGE 1 TO 38

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE THELTON E. HENDERSON,
CHIEF JUDGE

| | | |
|---|---|---|
| ALEJANDRO MADRID, ET AL., PLAINTIFFS, | ) | |
| VS. | ) | NO. C-90-3094 TEH |
| JAMES GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., DEFENDANT. | ) | |

SAN FRANCISCO, CALIFORNIA
TUESDAY, MAY 21, 1996

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: WILSON, SONSINI, GOODRICH & ROSATI
650 PAGE MILL ROAD
PALO ALTO, CALIFORNIA 94304-1050

BY: BERNARD J. CASSIDY, ESQ.

PRISON LAW OFFICE
GENERAL DELIVERY
SAN QUENTIN, CALIFORNIA 94964

BY: DONALD SPECTER, ESQ.

(APPEARANCES CONTINUED ON NEXT PAGE)

REPORTED BY: ROBERTA L. ROGERS, CSR, CP, CM
OFFICIAL REPORTER, USDC

COMPUTER-AIDED TRANSCRIPTION BY TURBOCAT

FOR DEFENDANT: STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
ATTORNEY GENERAL'S OFFICE
50 FREMONT STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA
94105-2239

BY: SUSAN DUNCAN LEE
DEPUTY ATTORNEY
GENERAL

[p. 3] TUESDAY, MAY 21, 1996 3:30 P.M.

THE CLERK: C-90-3094, ALEJANDRO MADRID, ET AL. VERSUS JAMES GOMEZ, ET AL.

STATE YOUR APPEARANCES, PLEASE, COUNSEL.

MS. LEE: GOOD AFTERNOON, YOUR HONOR.

SUSAN DUNCAN LEE, DEPUTY ATTORNEY GENERAL, FOR THE DEFENDANTS.

MR. SPECTER: DONALD SPECTER FOR THE PLAINTIFFS.

MR. CASSIDY: AND BERNARD CASSIDY FOR THE PLAINTIFFS, YOUR HONOR.

THE COURT: OKAY. GOOD AFTERNOON TO ALL OF YOU. I GUESS WE COULD SAY LONG TIME NO SEE. OKAY.

I'VE BEEN – LET ME START OFF BY SAYING YOU'VE GOTTEN COPIES OF THE QUESTIONS I WANT YOU TO ADDRESS DURING THE COURSE OF YOUR PRESENTATION.

BUT ALSO LET ME SAY THAT I'VE BEEN INFORMALLY ADVISED BY THE GENERAL COUNSEL'S OFFICE OF OUR ADMINISTRATIVE OFFICE IN WASHINGTON, D.C. THAT THERE ARE FUNDS AVAILABLE NOW TO PAY FOR SPECIAL MASTERS AND FOR THEIR EXPERTS AND STAFF AND THAT THE HOURLY RATE CAP WILL NOT BE APPLIED TO EXPERTS AND STAFF.

ON THE BASIS OF THIS REPRESENTATION, I'VE INFORMED MY SPECIAL MASTER – OUR SPECIAL MASTER, TOM LONERGAN, THAT HE MAY REACTIVATE ANY EXPERTS OR STAFF THAT HE FEELS ARE [p. 4] NECESSARY.

I'M EXPECTING A FORMAL MEMORANDUM CONFIRMING WHAT I'VE JUST BEEN TOLD INFORMALLY. I'M EXPECTING THAT FROM THE GENERAL COUNSEL'S OFFICE. AND THIS SAME MEMORANDUM SHOULD BE SENT TO ALL AFFECTED DISTRICT COURT JUDGES, IN ADDITION TO MYSELF.

NOW, GIVEN THIS DEVELOPMENT, I THINK IT WOULD BE PREMATURE TO REACH THE SECOND ISSUE THAT I IDENTIFIED IN MY ORDER; WHETHER SUBSECTION 802(F)(4), WHICH RELIEVES STATES FROM RESPONSIBILITY FOR PAYMENT OF SPECIAL MASTERS AND THEIR COSTS, IS ENFORCEABLE IN THE ABSENCE OF AVAILABLE FEDERAL FUNDS.

I THINK IT ALSO TAKES SOME OF THE PRESSURE OFF THE NEED FOR AN IMMEDIATE RESOLUTION OF THE ISSUES CONCERNING SUBSECTION 804(F)(4).

NOW, AS I SAY, THAT'S BY WAY OF INTRODUCTION. I'VE PROVIDED YOU WITH QUESTIONS TO LET YOU KNOW WHAT'S ON MY MIND. THAT'S THE PURPOSE OF MY PROCEDURE OF GIVING YOU THESE QUESTIONS.

YOU SHOULDN'T TAKE THE POSITION THAT ANY ONE OF THEM IS A DUMB QUESTION, BECAUSE EVEN IF IT IS, I MAY RULE ON THE BASIS OF MY IMPRESSION OF ITS IMPORTANCE. AND SO YOU SHOULD AT LEAST DISABUSE ME OF ITS IMPORTANCE.

YOU SHOULD ANSWER THESE IN THE COURSE OF YOUR REMARKS AND WORK THEM IN OR ANSWER THEM, WHATEVER WORKS BEST [p. 5] FOR YOU, BUT KNOW THAT THESE THINGS ARE ON MY MIND. DON'T LIMIT YOUR PRESENTATION TO THESE QUESTIONS.

WITH THAT, LET'S BEGIN WITH THE MOVING PARTY.

MR. SPECTER: WHO'S THE MOVING PARTY?

THE COURT: WELL, LET'S BEGIN WITH MS. LEE.

MS. LEE: WELL, THANK YOU, YOUR HONOR.

WELL, I THINK WE HAVE A NEW DAY. JUST WHEN WE THOUGHT WE KNEW HOW THIS

WORKED, CONGRESS PASSED THE PRISON LITIGATION REFORM ACT AND THE PRESIDENT SIGNED IT. AND I THINK WE WERE ALL SURPRISED BY THAT.

AND TO BE HONEST, WE DON'T KNOW THE FULL EXTENT OF WHAT IT MEANS AND WE EXPECT THOSE QUESTIONS TO BE ANSWERED IN FACTUAL CONTEXT AS THEY ARISE.

THIS QUESTION HAS BEEN PRESENTED TO US, WE'VE LOOKED AT IT AND WE THINK IT'S PRETTY CLEAR FROM THE STATUTORY LANGUAGE, AND WHAT WE'VE SEEN SO FAR OF THE LEGISLATIVE HISTORY, THAT IT DOES APPLY TO THE EXPERTS AND STAFF OF SPECIAL MASTERS AS WELL AS SPECIAL MASTERS; THAT IT APPLIES HERE AND THAT IT APPLIES NOW. BEYOND THAT, WE DON'T REALLY HAVE ANYTHING ELSE BUT SPECULATION.

SO I'M GLAD YOU POSED THESE QUESTIONS. THEY GIVE ME A LITTLE MORE TO SAY. ONE THING IS YOU ASKED ABOUT WHETHER THERE'S ANY OTHER PERTINENT LEGISLATIVE HISTORY THAN THE ONE STATEMENT BY SENATOR KYL THAT WE CITED, AND I BELIEVE THERE IS.

[p. 6] I HAVE A DISK WHICH I RECEIVED FROM A MEMBER OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, WHICH IS SUPPOSED TO HAVE THE COMPLETE LEGISLATIVE HISTORY OF THIS ACT ON IT. AND WE'RE IN THE PROCESS OF FORMATTING IT AND I'VE STARTED REVIEWING IT. AND I HAVE NOT SEEN VERY MUCH THAT IS RELEVANT TO THIS PARTICULAR ISSUE. THERE'S A LOT OF HISTORY ON SOME OF THE OTHER THINGS.

JUST THIS AFTERNOON BEFORE I CAME I PULLED OUT ONE PARAGRAPH THAT APPEARED TO ME TO BE RELEVANT. SINCE IT'S SO SHORT I'LL READ IT TO YOU. IT IS FROM THE JUDICIARY COMMITTEE REPORT ON HOUSE OF REPRESENTATIVES BILL 667, WHICH IS ONE OF THE EARLIER DRAFTS OF THIS LEGISLATION. THE COMMITTEE REPORT IS DATED FEBRUARY 6TH, 1995.

THE DRAFT OF THE LEGISLATION THAT WAS BEING COMMENTED ON HERE WOULD HAVE LIMITED THE USE OF SPECIAL MASTERS IN PRISON CASES TO MAGISTRATES ONLY. IN OTHER WORDS, THERE WOULD HAVE BEEN NO RULE 53 SPECIAL MASTERS IN PRISON CASES, BUT ONLY MAGISTRATES FOR FINDINGS OF FACT.

OBVIOUSLY, THAT PROVISION WAS AMENDED AND CHANGED AND THROWN OUT AND WE HAVE WHAT WE HAVE NOW. BUT THE COMMENT THAT I FOUND WAS RELEVANT WAS THIS:

> IN LIMITING APPOINTMENT OF SPECIAL MASTERS TO MAGISTRATES AND IN LIMITING THE USE OF SPECIAL MASTERS TO THE PURPOSE ONLY OF AIDING THE COURT IN FACT FINDING, THIS PROVISION APPLIES EVEN IF THE [p. 7] AGENT OF THE COURT IS TITLED OR DESCRIBED BY THE COURT NOT AS A SPECIAL MASTER, BUT AS A RECEIVER, MASTER, MASTER HEARING OFFICER, MONITOR, HUMAN RIGHTS COMMITTEE, OMBUDSMAN OR CONSULTANT. THE LIMITATION IN THIS PROVISION ON THE SELECTION AND USE OF MASTERS IS INTENDED TO APPLY TO ANYONE RELIED ON BY THE

COURT TO MAKE FACTUAL FINDINGS OR TO MONITOR OR REVIEW COMPLIANCE WITH, ENFORCEMENT OF, OR IMPLEMENTATION OF A CONSENT DECREE OR COURT ORDERED RELIEF IN A PRISON CONDITIONS SUIT.

WE'LL CERTAINLY READ THE REST, AND IF THERE'S ANYTHING NEGATIVE, I WILL LET YOU KNOW. THE ONLY NEGATIVE COMMENTS THAT I'VE SEEN WERE ALSO COMMENTS ON THIS DRAFT THAT WOULD HAVE LIMITED USE TO SPECIAL MASTERS, TESTIMONY BY, AMONG OTHERS, STEVE MARTIN, WHO TESTIFIED AS AN EXPERT IN THE MADRID CASE, AND OTHERS WHO COMMENTED THAT USING ONLY MAGISTRATES WOULD BE BAD NOT ONLY FOR THE JUDICIARY, BUT ALSO FOR PRISONS BECAUSE THE USE WOULD BE LIMITED TO FORMAL HEARINGS AND FACT FINDING AND THAT MORE WAS REQUIRED IN PRISON CASES.

THAT'S ALL I KNOW RIGHT NOW. BUT BASED ON WHAT WE DO KNOW NOW, IT SEEMS PLAIN TO US THAT ONE OF THE PURPOSES OF THIS SECTION 802(F)(4) WAS IN FACT TO LIMIT THE USE OF SPECIAL MASTERS.

THE HISTORY COMMENTS ON THIS AND OTHER PROVISIONS ARE REALLY REPLETE WITH A LOT OF – WHAT IS THE WORD I'M [p. 8] LOOKING FOR – HORROR STORIES, A PARADE OF HORRIBLES OF PRISON LITIGATION, INJUNCTIONS AND CONSENT DECREES THAT HAD BEEN IMPLEMENTED AND MONITORED BASICALLY INTO THE GROUND.

THERE WAS A SENSE THAT FEDERAL COURTS AROUND THE COUNTRY HAD INTRUDED TOO FAR INTO THE DAY-TO-DAY OPERATIONS OF PRISONS, HAD HELD ON TOO LONG WHEN IT WAS NO LONGER NECESSARY. AND THIS ACT, AND THIS LITTLE PART OF THE ACT ESPECIALLY, DOES SEEM DIRECTLY INTENDED TO PARE BACK ON THE EXERCISE OF THE ABUSE OF SOME OF THOSE POWERS.

AND IT ALSO SEEMS CAREFULLY DESIGNED NOT TO TAKE AWAY ANY OF THE POWERS OF THE FEDERAL COURT, BUT ONLY TO LIMIT IN TERMS OF TIME AND EXPENSE HOW POWER WILL BE EXERCISED.

ONE OF THE QUESTIONS YOU ASKED US IS WHETHER THIS ACT – YOU NOTED THAT IT DOES NOT DEFINE THE PHRASE "POWERS OF A MASTER" IN THE DEFINITION SECTION AND ASKED HOW SHOULD THE COURT DETERMINE WHAT CONSTITUTES THE POWERS OF A MASTER AS USED IN THIS PROVISION.

I THINK THAT – THE DEFENDANTS THINK THAT THAT TERM "POWERS" IN THE DEFINITION SECTION SHOULD BE INTERPRETED BROADLY. IT'S THERE TO – TO EXPAND THE DEFINITION OF A SPECIAL MASTER TO ANYONE WHO EXERCISES THE POWERS OF A MASTER AND ANYBODY WHO DOES THE KINDS OF THINGS A SPECIAL MASTER DOES.

THE LEGISLATIVE HISTORY I JUST QUOTED RELATES TO THAT AND – AND IF YOU'RE LOOKING FOR – FOR SORT OF A TEXTUAL [p. 9] BASE, I THINK THE COURT COULD ASSUME THAT POWERS OF A

MASTER, AS USED IN THIS ACT, REFERS TO THE RULE 53 POWERS, AS LIMITED BY 802, AND THE POWERS OF SPECIAL MASTERS AS HAS BEEN APPROVED IN CASE LAW APPROVING USE OF SPECIAL MASTERS.

AND I MEAN VERY EXPANSIVELY – FACT FINDING, HEARINGS, REPORTING, MONITORING, CONSULTING WITH EXPERTS, COMMUNICATION WITH DEFENDANTS, TOURS, AND ALL THE REST. I THINK IT'S INTENDED VERY BROADLY IN THAT SENSE.

THE COURT: SHOULD I VIEW THAT, GIVEN THAT DESCRIPTION OF IT, AS SORT OF GENERAL OR IS THERE AN EXHAUSTIVE LIST?

I COULD FORESEE – AND ONE REASON I ASKED THIS QUESTION IS I COULD SEE A DISPUTE DOWN THE LINE OVER AN ITEM. AND MR. SPECTER SAYS THAT'S NOT A POWER OF A MASTER AND YOU SAY IT IS, EVEN THOUGH IT'S NOT SOMETHING THAT – HOW WOULD I DETERMINE THAT? THAT'S REALLY WHAT I'M ASKING. WHAT DO I LOOK TO IN – YOU KNOW, THE CLEAR STUFF IS CLEAR.

MS. LEE: RIGHT, THE CLEAR STUFF.

THE COURT: WHERE IS THE FUZZY STUFF? HOW DO I RESOLVE THAT? WHAT DO I LOOK TO?

MS. LEE: I THINK YOU SHOULD LOOK AT RULE 53 NOW AS LIMITED BY 802, ALL CASES INTERPRETING RULE 53, AND ALL CASES APPROVING USES OF SPECIAL MASTERS APPOINTED UNDER RULE 53 OR INHERENT POWERS.

AND IF YOU WANTED TO DRAW A LINE, I THINK THAT WOULD [p. 10] BE A REASONABLE LINE TO DRAW. IF NO CASE HAS EVER IDENTIFIED IT AS AN APPROPRIATE POWER OF A MASTER APPOINTED UNDER RULE 53 OR INHERENT POWERS, THEN I THINK YOU COULD SAY THAT WAS NOT A POWER OF A MASTER.

THE COURT: OKAY. BUT IT GETS EVEN TRICKY BEYOND THAT, BECAUSE AS THE DOCUMENT YOU READ EARLIER READS THAT THEY'RE ALSO SAYING JUDGES LIKE ME CAN'T – CAN'T BE TRICKY AND SAY, WELL, I'M GOING TO CALL THIS PERSON A – SOMETHING ELSE. THAT IF THEY ARE, IN FACT, LABELED SOMETHING ELSE, BUT THEY REALLY ARE THE POWERS OF A MASTER, IT STILL APPLIES UNDER THIS SECTION, RIGHT?

SO THAT THAT WOULDN'T EXHAUST THE RESEARCH. YOU'RE SUGGESTING THAT I COULD LOOK AT ALL THE CASES DEALING WITH MASTERS AND EXHAUST THAT. BUT THERE MUST BE CASES, I WOULD GATHER, THAT PEOPLE HAVE EXERCISED THE POWERS OF A MASTER, BUT THEY HAVE BEEN CALLED AN EXPERT OR SOMETHING ELSE; IS THAT RIGHT?

MS. LEE: THAT'S RIGHT. AND THAT'S WHAT THE PHRASE "INHERENT POWERS" IS, I THINK, SUPPOSED TO CAPTURE.

AND I THINK WHAT THAT LANGUAGE INTENDS TO EXCLUDE IS SOMEBODY WHO IS CALLED SOMETHING ELSE, OR EVEN CALLED A SPECIAL MASTER, AND IS DOING WHAT A NONSPECIAL MASTER

WOULD DO, LIKE AN ACCOUNTANT OR – I'M NOT THAT FAMILIAR WITH THE OTHER SORT OF ANCILLARY ACTORS OF THE COURT.

BUT IF THEY'RE NOT EXERCISING THE KIND OF POWER – [p. 11] IF THEY WERE, YOU KNOW, FOR EXAMPLE, DOING AN ACCOUNTING IN A CASE, OR SOMETHING LIKE THAT, I THINK YOU COULD EXCLUDE THAT SORT OF THING.

AND AGAIN, THIS – THIS – THIS IS WHY I STARTED THE WAY I STARTED. WE DON'T REALLY KNOW WHAT IT'S GOING TO MEAN IN THE FUTURE AND WITHOUT THE FACTUAL SITUATION. IT'S HARD TO PREDICT EXACTLY WHERE IT COULD GO.

LET ME SEE IF I'VE ADDRESSED THE OTHER QUESTIONS. YOU NOTED THAT DEFENDANTS DID NOT ARGUE THAT A SPECIAL MASTER IS A FORM OF PROSPECTIVE RELIEF FOR PURPOSES OF THE EXPRESS RETROACTIVITY PROVISION IN 802(B)(1) AND ASKED WHETHER WE WOULD AGREE THAT THAT 802(B)(1) DOESN'T GOVERN.

MY RESPONSE IS NO, WE DO THINK THAT 802(B)(1) GOVERNS; THAT THE SPECIAL MASTER IS IN THE NATURE OF PROSPECTIVE RELIEF. AND SOMETIMES PLAINTIFFS IN CASES LIKE THIS EVEN PRAY FOR APPOINTMENT OF A SPECIAL MASTER. THEY DIDN'T IN THIS CASE, BUT THEY HAVE IN OTHERS, AND OFTEN RELY ON APPOINTMENT OF A SPECIAL MASTER AS EVIDENCE IN THEIR FAVOR THAT THEY'RE PREVAILING PARTIES AND ARE ENTITLED TO FEES.

BUT EVEN IF IT'S NOT PROSPECTIVE RELIEF WITHIN THE MEANING OF THAT TERM, WE THINK THE *LANDGRAF* CASE PRINCIPLES APPLY; THAT THE SPECIAL MASTER FEES ARE COLLATERAL TO THE ACTION AND, THEREFORE, PROVISIONS AFFECTING THEM CAN HAVE A RETROACTIVE EFFECT.

YOU ASKED WHETHER DEFENDANTS AGREE THAT OTHER [p. 12] SUBSECTIONS IN SECTION (F) DO NOT APPLY TO PREVIOUSLY APPOINTED SPECIAL MASTERS? AND IF NOT, WHY NOT?

I HADN'T GIVEN THAT A LOT OF THOUGHT BEFORE TODAY AND I HESITATE TO TRY TO GIVE YOU A DEFINITIVE ANSWER. BUT MY FIRST IMPRESSION IS THAT THE SECTIONS THAT TALK ABOUT HOW A SPECIAL MASTER IS TO BE APPOINTED, A LIST TO BE COMPILED AND GIVEN TO BOTH PARTIES WITH NAMES STRICKEN AND SO ON, WOULD NOT APPLY IN THIS CASE BECAUSE OUR SPECIAL MASTER HAS ALREADY BEEN APPOINTED.

AND THIS – IN HAVING – WHEN WE SAY IT HAS RETROACTIVE EFFECT, I KNOW YOU'RE WELL AWARE THAT DOESN'T MEAN THEY WOULD GO BACK AND UNDO THINGS THAT HAD BEEN DONE.

WHAT THAT MEANS IT APPLIES FROM THIS DAY FORWARD, WHETHER IT'S IN AN ONGOING ACTION OR NOT. SO WE WOULDN'T ARGUE THAT THIS WOULD UNDO THE APPOINTMENT OF EXISTING SPECIAL MASTERS. WE CERTAINLY WOULDN'T MAKE THAT ARGUMENT IN THIS CASE. AND WE WOULDN'T SAY THAT THE APPOINTMENT WAS

INVALID BECAUSE IT WASN'T DONE UNDER THESE TERMS.

THE COURT: SO WHEN YOU SAY THIS "DAY FORWARD," YOU MEAN THREE OR FOUR WEEKS AGO WHEN IT WAS PASSED FORWARD, BUT NOT GOING BACK TO UNDO THINGS THAT HAD BEEN DONE; IS THAT –

MS. LEE: THAT'S WHAT I MEAN.

AS OF APRIL 25TH, WHATEVER DAY THAT THE PRESIDENT SIGNED THE BILL, THAT IT APPLIES TO THINGS THAT HAPPEN IN THE FUTURE FROM THAT DATE AND DOESN'T GO BACK AND UNDO. AND IT [p. 13] WOULDN'T REOPEN FINAL JUDGMENTS OR ANYTHING OF THAT NATURE.

THE COURT: YES.

MS. LEE: AND WE WOULD CONSIDER THE APPOINTMENT – THE ORDER APPOINTING THE SPECIAL MASTER IN THIS CASE TO BE THE KIND OF COMPLETED TRANSACTION THAT THIS WOULDN'T UNDO.

IF THERE'S ANY LOGICAL INCONSISTENCY IN ARGUING THAT SOME PROVISIONS APPLY AND OTHERS DON'T, THEN WE WOULD HAVE TO GO BACK AND DO THE ANALYSIS AND CONSIDER WHETHER IT NEEDED TO BE DONE ALL OVER AGAIN. BUT I JUST DON'T SEE THAT ARGUMENT COMING FROM THE DEFENDANTS IN THIS CASE.

YOU ASKED WHY THE SUBSECTION DOES NOT IMPEDE THE INDEPENDENCE OF THE JUDICIARY BY

REQUIRING THE JUDICIARY TO FUND THE REMEDIAL PROCESS FOR ONE PARTY'S CONSTITUTIONAL VIOLATIONS.

AND I HAVE TO SAY I'M NOT SURE I UNDERSTAND THE QUESTION. I UNDERSTAND – IN MY MIND –

THE COURT: IT JUST POSES A QUESTION. ONE OF THE ARGUMENTS THAT I'M HEARING AND THAT HAS BEEN IN THE PRESS AND DISCUSSED AMONG THE JUDICIARY IS THAT SECTION, THE SEPARATION OF POWERS ARGUMENT ESSENTIALLY. WHY DOES THIS NOT VIOLATE SEPARATION OF POWERS IS ANOTHER WAY TO PHRASE THIS.

MS. LEE: OKAY.

THE COURT: AND THAT, I THINK, IS THE ISSUE HOVERING, AT LEAST BEHIND THIS CASE, AS TO THE CONSTITUTIONALITY OF THE ARTICLE OR PARTS OF IT.

[p. 14] MS. LEE: YEAH. WELL, THE SEPARATION OF POWERS QUESTION IS A REAL BIG ONE, AND THERE'S A LOT OF JURISPRUDENCE ON IT, AS YOU KNOW. AND I JUST HAVEN'T DONE THE RESEARCH INTO THAT TO NARROW IT DOWN TO THIS SUBSECTION.

MY IMPRESSION IS THERE ARE BASICALLY TWO SCHOOLS OF THOUGHT ON CONGRESS'S ABILITY TO LIMIT FEDERAL REMEDIAL POWERS.

THAT ONE SCHOOL HOLDS THAT SINCE CONGRESS HAS THE POWER TO CREATE AND PRESUMABLY TAKE AWAY THE FEDERAL COURTS, IT HAS ANY

POWER LESSER THAN THAT TO – TO PARE AWAY REMEDIAL POWERS IN ANY FASHION IT CARES TO.

AS I UNDERSTAND IT, THERE'S ANOTHER SCHOOL THAT HOLDS THAT CONGRESS CAN'T REMOVE A REMEDIAL POWER IF IT WOULD TAKE AWAY THE ONLY FORUM FOR VINDICATING A RIGHT, A CONSTITUTIONAL RIGHT.

FOR PURPOSES OF ARGUMENT TODAY, I HAVE TO PLACE MYSELF IN THE FIRST SCHOOL, THAT CONGRESS HAS THE POWER TO PARE AWAY REMEDIAL POWERS OF FEDERAL COURTS BECAUSE IT COULD UNDO THEM ALL TOGETHER. BUT I ALSO HAVE TO NOTE THAT IT HASN'T REMOVED ANY PRIMARY RIGHTS IN THIS BILL.

SO I WOULD REALLY REQUEST AN OPPORTUNITY TO BRIEF SEPARATION OF POWERS. I THINK IT'S A VERY SOPHISTICATED ISSUE IF IT WAS GOING TO GO ANYWHERE, BUT I DON'T SEE THIS PARTICULAR SUBSECTION AS A SERIOUS INTRUSION ON THE INDEPENDENCE OF THE JUDICIARY OR ANY INTRUSION AT ALL.

[p. 15] FINALLY, YOU ASKED WHAT REASONS CONGRESS HAD FOR ENACTING SECTION (F)(4) AND WAS IT SEEKING TO DISCOURAGE FEDERAL JUDGES FROM USING SPECIAL MASTERS BY MAKING THEM – BY MAKING THE JUDICIARY BEAR THE COST.

AND I HAVE TO SAY YES, IN A WAY I THINK IT WAS ONE OF CONGRESS'S PURPOSES. I AM CERTAINLY NOT STANDING HERE TELLING YOU THAT THIS CASE OR THIS COURT WAS ON CONGRESS'S

MIND, BUT – AND WE DIDN'T PUT IT IN FRONT OF CONGRESS, BUT THERE ARE A LOT OF PRISON CASES AROUND THE COUNTRY AND THERE WAS A DEFINITELY A PERCEPTION THAT INTRUSIONS HAD GONE TOO FAR, JURISDICTION HAD BEEN HELD TOO LONG AND THAT THERE NEEDED TO BE EXTERNAL LIMITS ON SOME OF THE REMEDIAL POWERS IN PRISON CASES, AND I THINK THAT THAT IS EXACTLY WHAT THEY HAD IN MIND.

THE COURT: OKAY. THEN I TAKE IT THE STATUTORY SCHEME, SINCE THE LEGISLATION DOES SEEM TO SAY, TO PERSONALIZE IT TO THIS CASE, THAT IT CAN EVEN GO BEYOND THE TWO YEARS IF I SIMPLY ARTICULATE THE PROPER REASONS FOR GOING OVER.

IS THAT WHAT YOU SEE AS PART OF THIS SCHEME? AS LONG AS THERE ARE CONTINUING PROBLEMS OF CONSTITUTIONAL DIMENSION THAT NEED TO BE CORRECTED, I CAN ARTICULATE THOSE TO SOME LEVEL OF SATISFACTION AND CONTINUE TO HAVE JURISDICTION.

IS THAT THE WAY YOU VIEW IT?

MS. LEE: THAT'S THE WAY WE SEE IT; THAT WHAT THEY ARE INTENDING TO DO HERE IS TO HAVE COURTS REVISIT THE ISSUE AT REASONABLE PERIODS AND MAKE PROPER FINDINGS THAT THERE ARE [p. 16] CONDITIONS THAT STILL TO BE REMEDIATED, AND ON THAT BASIS CONTINUE TO EXERT JURISDICTION.

I DON'T SEE ANY INTENT HERE TO HAVE A TWO YEAR DROP DEAD DATE IN EVERY CASE. AND I THINK THERE WAS SOMETHING OF THAT NATURE CONSIDERED IN EARLIER DRAFTS AND REJECTED.

THE COURT: OKAY. THANK YOU, MS. LEE.

MS. LEE: THANK YOU.

THE COURT: COUNSEL.

MR. CASSIDY: GOOD AFTERNOON, YOUR HONOR.

THE COURT: GOOD AFTERNOON.

MR. CASSIDY: BERNARD CASSIDY FOR THE PLAINTIFFS.

I'M NOT SURE WHERE TO START, ALTHOUGH I WOULD LIKE TO MENTION THAT THE CONCESSION BY THE DEFENDANTS IN THIS CASE ON YOUR QUESTION 4, THAT CONGRESS SEEMS TO BE INTERESTED IN DISCOURAGING THE FEDERAL JUDICIARY, IS A VERY SIGNIFICANT CONCESSION.

WE THINK THERE ARE VERY STRONG SEPARATION OF POWERS PROBLEMS IF THIS STATUTE DOES APPLY IN THE CASE OF *MADRID VERSUS GOMEZ*.

WE DON'T THINK IT APPLIES IN THIS CASE. WE THINK IT'S UNUSUAL – IN FACT, WE FOUND NO CASE IN WHICH THE JUDICIARY HAS BEEN REQUIRED TO PAY FOR A REMEDY BEFORE.

AND IN OTHER CASES ARTICLE III HAS ACTED AS A BAR TO CABIN THE POWER OF CONGRESS IN

MANAGING THE AFFAIRS OF THE JUDICIARY, PARTICULARLY IN THE *NORTHERN PIPELINE VERSUS* [p. 17] *MARATHON OIL* CASE.

THERE IN 1978 CONGRESS CONSTRUCTED A WHOLE NEW SCHEME OF HANDLING BANKRUPTCY ISSUES. NORTHERN PIPELINE DECLARED BANKRUPTCY, SUED ANOTHER COMPANY, MARATHON, FOR CONTRACTUAL AND OTHER COMMON LAW RIGHTS.

MARATHON SAID: YOU CAN'T DO THAT. THAT'S AN EXERCISE OF JUDICIAL POWER TO DECIDE THIS. THE BANKRUPTCY COURT IS NOT EMPOWERED TO DECIDE THAT. THAT'S AN ARTICLE III COURT'S JOB.

AND THE SUPREME COURT AGREED AND SAID THAT THERE ARE LIMITS UNDER THE SEPARATION OF POWERS DOCTRINE WHICH ARISES FROM ARTICLE III.

AND THIS IS NOT LIKE A REMEDY STRIPPING SITUATION. IT IS TRUE, AS THE DEFENDANTS CONCEDE, THAT – OR CLAIM RATHER – THAT CONGRESS HAS ENORMOUS POWER OVER WHAT MATTERS CAN BE BROUGHT BEFORE THE JUDICIARY.

THAT'S NOT REALLY WHAT'S GOING ON IN THIS CASE. IN THIS CASE THE NATURE OF THE JUDICIARY IS BEING ATTACKED. THE JUDICIARY IS NO LONGER A NEUTRAL ARBITER WHO STANDS BETWEEN TWO PARTIES AND MAKES DECISIONS. BUT BY THE REQUIREMENT THAT PART OF THE REMEDY MUST COME OUT OF THE JUDICIARY'S

POCKET, THE JUDICIARY IS TRANSFORMED INTO A PARTY WITH A DIRECT MONETARY INTEREST.

WE'VE NEVER SEEN ANYTHING LIKE THAT BEFORE AND WE THINK IT'S VERY PROBLEMATIC FROM THE SEPARATION OF POWERS [p. 18] DOCTRINE.

THE COURT: WHAT IS AGAIN PERSONALIZING THAT ARGUMENT TO THIS CASE – WHAT WOULD BE MY MONETARY INTEREST?

IF I PAY A HALF MILLION DOLLARS OVER THE NEXT YEAR – AND I'VE JUST PICKED A FIGURE – TO TOM LONERGAN AND EXPERTS, THE ARGUMENT IS THAT I HAVE TO DECIDE WHETHER I GET A NEW COUCH BACK THERE, OR WHAT IS THAT?

MR. CASSIDY: IT'S NOT THAT ONE PARTICULAR COURT HAS TO MAKE ANY DECREASE IN ITS LIFESTYLE OR IN THE RANGE OF SERVICES THAT IT PROVIDES TO LITIGANTS OR TO THE CITIZENRY, YOUR HONOR.

IT'S MORE THAT CONGRESS HAS ENORMOUS POWER TO SHIFT COSTS, BUT WE DON'T BELIEVE IT CAN SHIFT COSTS TO THE JUDICIARY. THAT, INSTITUTIONALLY SPEAKING, THAT DENUDES THE JUDICIARY OF ITS SPECIAL NATURE WHICH IS PROTECTED BY ARTICLE III AS A INDEPENDENT BODY.

AND ONCE YOU LOSE THAT INDEPENDENCE THROUGH ANY SITUATION LIKE THIS, YOU'RE NO LONGER ACTING, INSTITUTIONALLY SPEAKING, AS A NEUTRAL ARBITER.

AND THE COURT DOESN'T TO FIND, IN FACT, THAT THERE WILL BE A TEMPTATION THAT IS EXECUTED. THE COURT ONLY HAS TO FIND, AS IN THE *TASHIMA* CASE, AND IN THE *NORTHERN PIPELINE* CASE, THAT THERE IS A POSSIBILITY INSTITUTIONALLY THAT THAT COULD HAPPEN.

THERE DOESN'T HAVE TO BE AN EVENT THAT OCCURS. IT'S [p. 19] JUST THE INSTITUTIONAL POSSIBILITY THAT IT HAPPENS, WHICH IS OFFENSIVE TO THE CONSTITUTION SEPARATION OF POWERS DOCTRINE.

I'D LIKE TO TURN TO THE FIRST QUESTION YOU ASK, YOUR HONOR, THE PLRA DOES NOT DEFINE THE PHRASE "POWERS OF A MASTER."

WE THINK THAT IN LIGHT OF THE STRUCTURE OF THE STATUTE, THE PHRASE SHOULD BE READ NARROWLY. THAT IT IS TRUE ELSEWHERE THE STATUTE SAYS THAT ANYONE WHO ACTS AS A SPECIAL MASTER MUST BE TREATED AS A SPECIAL MASTER. SORT OF IF IT WALKS LIKE A DUCK AND LOOKS LIKE A DUCK, IT'S A DUCK.

WELL, THIS DUCK HAS TO WALK IN A VERY PARTICULAR WAY. THIS DUCK CANNOT MAKE EX PARTE COMMUNICATIONS. THAT'S VERY CLEAR FROM THE STATUTE. AND THAT, I THINK, IS THE KEY TO UNDERSTANDING WHAT THIS STATUTE IS ALL ABOUT.

CONGRESS HAS IN MIND A VERY FORMAL ARRANGEMENT HERE WHEREBY THE SPECIAL MASTER ACTS IN SOME WAYS AS A SUBSTITUTE COURT.

AND THE IMPORTANT WORK THAT SPECIAL MASTER LONERGAN HAS DONE WOULD NOT BE DONE UNDER THE SECTION 802 SPECIAL MASTER'S PURVIEW.

WE THINK THAT IF THIS STATUTE DOES APPLY, AND SPECIAL MASTER LONERGAN HAS HIS POWERS CABINED BY THE STATUTE, THEN A LOT OF THE WORK THAT HAS BEEN DONE HAS TO BE DONE UNDER SOME OTHER MEANS. AND WE THINK THAT THE MEANS WOULD BE THE APPOINTMENT OF EXPERT WITNESSES OR SOMETHING ELSE.

BUT BECAUSE THE SPECIAL MASTER CANNOT CONDUCT EX [p. 20] PARTE COMMUNICATIONS, THAT WOULD MEAN ANYONE WHO REPORTS TO THE SPECIAL MASTER COULD NOT DO SO. THAT THIS IS A NEUTRAL JUDICIAL-LIKE PERSON AS OPPOSED TO A COMBINATION FACT FINDER AND ADJUDICATOR AND MEDIATOR, IF YOU WILL.

AND THAT IF DEFENDANTS ARE GOING TO HAVE THIS STATUTE APPLY IN THIS CASE, THEY HAVE TO TAKE THE BITTER WITH THE SWEET. IF THOSE ARE THE SPECIAL MASTER'S POWERS, THEN THAT ALSO LIMITS THE COMPENSATION CLAUSE OF THE STATUTE. IT WOULD APPLY ONLY TO THE SPECIAL MASTER WHO EXERCISES THE VERY NARROWLY PROSCRIBED POWERS THAT THIS ACT PROVIDES FOR.

OTHER THINGS, SUCH AS GOING THROUGH A MOUNTAIN OF EVIDENCE TO EVALUATE HOW STRONGLY DEFENDANTS HAVE COME UP WITH A REMEDIAL MEDICAL PROGRAM, FOR EXAMPLE,

TALKING TO THE DOCTORS THERE, GETTING TO UNDERSTAND WHAT'S BEEN GOING ON ON A ONE-ON-ONE BASIS, ALL THOSE ACTIVITIES COULD NOT BE CONDUCTED BY THE SPECIAL MASTER UNLESS COUNSEL WERE PRESENT, AND SO ON.

AND THAT SEEMS TO ME TO BE ENORMOUSLY MORE EXPENSIVE PROSPECTIVELY THAN THE ARRANGEMENT THAT WE NOW HAVE.

BUT, IN ANY EVENT, IF THE STATUTE APPLIES, SPECIAL MASTER LONERGAN HAS TO LIMIT HIMSELF TO COMMUNICATIONS WHEN BOTH PARTIES ARE PRESENT. OTHER PERSONS ARE GOING TO BE NECESSARY TO EVALUATE THE ENORMOUS WORK THAT IS BEING DONE, AND THOSE PERSONS WOULD NOT FIT UNDER THE COMPENSATION CLAUSE OR UNDER THE POWERS OF THE SPECIAL MASTER AS DESCRIBED IN THIS ACT.

[p. 21] AS TO THE QUESTION ABOUT PERTINENT LEGISLATIVE HISTORY, WE AGREE WITH THE DEFENDANTS THAT THERE IS A LOT OF LEGISLATIVE HISTORY. WE'RE NOT PREPARED TO SPEAK DEFINITIVELY ON THAT.

HOWEVER, WE THINK THAT THE STATUTORY ISSUE IS RESOLVABLE WITHOUT DIVERTING TO THE LEGISLATIVE HISTORY BECAUSE OF THE STRONG PRESUMPTION AGAINST RETROACTIVITY THAT THE SUPREME COURT ANNOUNCED IN THE *LANDGRAF* CASE, WHICH WE DO BELIEVE APPLIES HERE.

ON THAT CASE, I SHOULD MENTION THAT DEFENDANTS PROPERLY INDICATED THAT THERE'S

SOME QUESTION AS TO WHETHER IT APPLIES IN PROCEDURAL MATTERS.

WE DO THINK THE APPOINTMENT OF A SPECIAL MASTER IS A PROCEDURAL ISSUE. I WOULD LIKE TO POINT OUT TO THE COURT AT PAGE 1502, NOTE 29, OF THE *LANDGRAF* CASE, THE COURT REMARKS:

> OF COURSE, THE MERE FACT THAT A NEW RULE IS PROCEDURAL DOES NOT MEAN THAT IT APPLIES FOR EVERY PENDING CASE.

IN OTHER WORDS, THE PRESUMPTION MAY STILL APPLY IN A PROCEDURAL MATTER, AS IT DOES HERE. AND THE COURT GOES ON TO SAY:

> IT LOOKS TO THE COMMON SENSE NOTION THAT THE APPLICABILITY OF SUCH PROVISIONS DEPENDS ON THE POSTURE OF THE PARTICULAR CASE.

IN THIS CASE THE APPOINTMENT OF A SPECIAL MASTER WHO [p. 22] IS CAPABLE OF CONDUCTING EX PARTE COMMUNICATIONS, OF TALKING TO PLAINTIFFS IN THE PRISON, TALKING TO DEFENDANTS AND THEIR EMPLOYEES, HAS BEEN, WE THINK, GREATLY SUCCESSFUL.

WE THINK THAT THE COURT SHOULD READ THE STATUTE IN LIGHT OF THE SUCCESS THAT HAS OCCURRED UP TO THIS POINT AND IN LIGHT OF THE ACTIONS OF THE PARTIES IN PROMOTING OR SLOWING DOWN THE REMEDY.

AND THAT IT'S A SPUR FOR DEFENDANTS TO HAVE TO PAY FOR A SPECIAL MASTER. THE SOONER

THAT THE REMEDY IS AFFECTED, THE SOONER THAT THEIR DUTY TO PAY A SPECIAL MASTER WILL END.

WE THINK THAT IT'S WORKING WELL. THERE'S A LOT OF WORK THAT REMAINS TO BE DONE. BUT WHETHER OR NOT THIS STATUTE APPLIES IN THIS CASE DEPENDS, AS THE SUPREME COURT POINTS OUT, IN PART, ON THE POSTURE OF THE PARTICULAR CASE.

THE PARTICULAR REMEDY THAT THIS COURT CHOSE WAS BASED ON THE FULL RECORD AND HAS BEEN TEMPERED IN LIGHT OF THE DEFENDANTS' BEHAVIOR SINCE THE RULING ON JANUARY 10, 1995.

WE THINK THAT THAT HAS TO BE KEPT IN MIND WHEN INTERPRETING THE STATUTE BECAUSE OF WHAT THE SUPREME COURT HAS SAID IN THE *LANDGRAF* CASE.

THE COURT ASKS IN QUESTION NUMBER 1 FOR PLAINTIFFS: WHY DOESN'T THE FACT THAT CONGRESS USED THE TERM, QUOTE, THIS SECTION IN 802(F)(4), BUT THE TERM, QUOTE, THIS SUBSECTION, END QUOTE, IN OTHER SUBSECTIONS INDICATE THAT CONGRESS INTENDED TO TREAT SECTION (F)(4) DIFFERENTLY THAN THE OTHER [p. 23] SUBSECTIONS?

THAT'S A VERY GOOD OBSERVATION REFLECTING A CLOSE READING OF THE TEXT. WE HAVE WRESTLED WITH THAT OURSELVES. CERTAINLY IT WOULD MAKE IT EASIER TO UNDERSTAND THE

STATUTE IF "SUBSECTION" WAS USED THROUGHOUT.

WE DON'T THINK ANYTHING FOLLOWS FROM THE USE OF "SUBSECTION" IN THOSE OTHER SECTIONS AND "SECTION" IN SUBSECTION (F)(4).

WE STILL THINK THAT THE STATUTE APPLIES – THE COMPENSATION CLAUSE APPLIES ONLY TO SPECIAL MASTERS APPOINTED UNDER THIS STATUTE WITH THE VERY NARROWLY PROSCRIBED POWERS THAT THIS SPECIAL MASTER HAS.

SO MY BEST GUESS IS THIS IS SIMPLY A SCRIBNER'S ERROR, IT'S NOT AN INTENTIONAL ACT, BECAUSE NOTHING SEEMS TO FLOW FROM IT.

ADDRESSING YOUR NEXT QUESTION. ASSUMING ARGUENDO THAT CONGRESS HAS NOT EXPRESSLY PRESCRIBED SUBSECTION (F)(4)'S PROPER REACH, THEN THE COURT MUST FOLLOW *LANDGRAF'S* JUDICIAL DEFAULT RULES. WE AGREE WITH THAT, YOUR HONOR.

DO ANY OF THE THREE FACTORS IDENTIFIED IN *LANDGRAF* APPLY WITH RESPECT TO THE RETROSPECTIVE APPLICATION OF (F)(4), AND IF SO, HOW?

YOUR HONOR, WE THINK TWO DO APPLY. WE THINK THAT THE FIRST, THE IMPAIRING OF RIGHTS POSSESSED WHEN THE PARTIES ACTED, APPLIES.

[p. 24] AND WE THINK THE THIRD, THE IMPOSITION OF NEW DUTIES RE COMPLETED TRANSACTION, APPLIES.

THE PLAINTIFFS' RIGHTS TO AN FULL AND EFFECTIVE CONSTITUTIONAL REMEDY COULD BE IMPAIRED IF THE EFFECT OF THE NEW ACT IS TO MAKE MONITORING MORE DIFFICULT AND MORE EXPENSIVE.

THE PLAINTIFF CLASS POSSESSED A RIGHT TO FULL PROTECTION UNDER THE EIGHTH AMENDMENT. IT WAS FOUND THAT THEY WERE NOT RECEIVING THAT. AND THE ONGOING PROTECTION OF THAT RIGHT COULD BE IMPAIRED IF, UNDER THE NEW STATUTE, ENORMOUSLY EXPENSIVE APPARATUS IS REQUIRED IN ORDER TO MAKE THOSE RIGHTS FULLY PROTECTED.

IT WILL BE VERY DIFFICULT, WITHOUT THE ACCESS THAT THE SPECIAL MASTER IN THIS CASE, MR. LONERGAN, HAS TO BOTH PLAINTIFFS AND DEFENDANTS, FOR US TO APPROPRIATELY MONITOR WHAT'S GOING ON.

IT WOULD TAKE MUCH MORE EFFORT THAN WE HAVE HAD TO EXPEND IN THE PAST. BUT WE WOULD UNDERTAKE THAT EFFORT, IF NECESSARY, IF IT BECAME REQUIRED UNDER THE NEW STATUTE.

PERHAPS, MORE IMPORTANTLY, THE IMPOSITION OF NEW DUTIES REGARDING COMPLETED TRANSACTION – WE FIND THAT THERE IS A NEW DUTY IMPOSED UPON THE COURT AS OPPOSED TO UPON A PARTY IF THIS ACT IS TO APPLY.

AND NOTABLY, IN THE LANGUAGE OF *LANDGRAF*, PARTIES ARE REFLECTED UNDER THE IMPAIRING OF RIGHTS. PARTIES ARE [p. 25] MENTIONED IN

CONNECTION WITH THE INCREASED LIABILITY FOR PAST CONDUCT. PARTIES ARE NOT MENTIONED IN CONNECTION WITH THE IMPOSITION OF NEW DUTIES.

AND, AGAIN, CONGRESS IS FREE TO ACT RETROSPECTIVELY AND TO SHIFT COSTS. BUT HERE THEY'RE SHIFTING COSTS IN A WAY WE THINK IS CONSTITUTIONALLY IMPROPER UPON THE JUDICIARY.

THE FINAL QUESTION THE COURT ASKS IS WHETHER THE COURT CAN INVOKE RULE 706, AS WE'VE URGED, WHEN BY ITS EXPRESS TERMS IT RELATES TO EXPERT WITNESSES, NOT TO CONSULTANTS AND ADVISORS.

AND, AGAIN, YOUR HONOR, THE ANSWER TO THIS FLOWS FROM THE NARROW CIRCUMSCRIBING OF THE POWERS OF THE SPECIAL MASTER.

IF THE SPECIAL MASTER CANNOT CONDUCT EX PARTE COMMUNICATIONS, IT WILL BE NECESSARY FOR SOMEONE TO EVALUATE ON A PERSONAL BASIS AND FROM AN EXPERT PERSPECTIVE THE MENTAL ATTITUDES OF THE DEFENDANTS, THE ACTUAL PROFESSIONAL WORK THAT THEY DO, AND THE ROBUSTNESS, OR OTHERWISE, OF THE REMEDIES THAT THEY PROPOSE.

AND WE THINK THAT WE CAN CERTAINLY ENVISION THAT EXPERTS, SUCH AS DOCTOR METZNER WOULD BE NECESSARY TO EVALUATE AND STUDY CAREFULLY AND GIVE AN OPINION TO

THE COURT UNDER CROSS-EXAMINATION CIRCUMSTANCES AS TO THE EFFECT ON THE CIVIL REMEDY.

AND THAT CERTAINLY IS ONE WAY TO GO. AGAIN, IT [p. 26] REFLECTS A MUCH MORE ORNATE AND FORMAL WAY OF GOING ABOUT THE BUSINESS OF REMEDYING THESE CONSTITUTIONAL WRONGS. AND THAT MAY BE WHAT CONGRESS HAS IN MIND.

THE QUESTION OF WHETHER CONGRESS HAD IN MIND THAT IT APPLIED TO AN ALREADY APPOINTED AND WORKING SPECIAL MASTER AND HIS TEAM, WE THINK IS ANOTHER QUESTION.

WE THINK IT, AS I MENTIONED EARLIER, POSES ENORMOUS DIFFICULTIES, IS NOT CONSISTENT WITH THE VERY CLEAR STATEMENT OF LAW IN *LANDGRAF*, WHICH IS CONGRESS IS PRESUMED NOT TO ACT RETROACTIVELY UNLESS IT MAKES A CLEAR STATEMENT THAT IT IS ACTING RETROACTIVELY.

INSIDE THE STATUTE WE FIND PORTIONS WHERE THE COURT IS REQUIRED TO ACT RETROACTIVELY. THE COMPENSATION CLAUSE IS NOT ONE OF THOSE. AND THAT MAKES SENSE. IT MAKES SENSE IF A SPECIAL MASTER IS ALREADY IN PLACE AND DOING AN ADEQUATE JOB, GIVEN THE OTHER PROTECTIONS.

IT MAY WELL BE, AS IN OUR CASE, THAT THE COURT HAS DEEMED IT PROPER THAT ONE OF THE PARTIES, NAMELY, THE PARTY THAT HAS COMMITTED THE CONSTITUTIONAL WRONG, BE RESPONSIBLE FOR THE PAYMENT OF THAT SPECIAL MASTER.

IT IS UNKNOWN TO US ANY OTHER EXAMPLE WHERE CONGRESS HAS REACHED OUT AND CHANGED A REMEDY AT THE EXPENSE OF THE JUDICIARY.

AND WE KNOW FROM RECENT HISTORY OF THE *PLAUT* CASE UNDER THE SECURITIES ACT OF 1934, CONGRESS REACTED TO A [p. 27] SUPREME COURT DECISION AND TRIED TO REOPEN FINAL JUDGMENTS MADE BY COURTS.

IN THE *PLAUT* CASE, THE COURT GAVE THE BACK OF ITS HAND TO THAT KIND OF CONGRESSIONAL REACHING INTO JUDICIAL RESOLUTIONS. *PLAUT* IS COUCHED IN TERMS OF FINAL JUDGMENTS.

THE RATIONAL, HOWEVER, OF RESPECTING JUDICIAL INDEPENDENCE, WHICH IS REFLECTED IN *PLAUT*, I THINK APPLIES HERE AS WELL.

HERE WE DON'T HAVE A FINAL JUDGMENT, BUT WE DO HAVE A WORKING ARRANGEMENT THAT SEEMS TO WORK AND HAS NOT BEEN OBJECTED TO BY EITHER PARTY. AND THAT THE IDEA THAT CONGRESS SHOULD UPSET THAT, I THINK, REFLECTS A GREAT DANGER TO THE INDEPENDENCE OF THE JUDICIARY IN REMEDYING THESE CONSTITUTIONAL HARMS.

ONE LAST COMMENT, YOUR HONOR, ABOUT *LANDGRAF*; THAT IT MIGHT BE HELPFUL TO NOTE THE TEXT OF THE CIVIL RIGHTS ACT OF 1991, WHICH WAS AT ISSUE IN *LANDGRAF*, AND WHETHER IT APPLIED RETROACTIVELY.

THAT STATUTE, WHICH IS FOUND – WAS PASSED BY THE 102ND CONGRESS. IT'S FOUND IN PUBLIC LAW 102166, SECTION 402(A), STATED:

> EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED, THIS ACT AND THE AMENDMENTS MADE BY THIS ACT SHALL TAKE EFFECT UPON ENACTMENT.

THAT STATUTE'S REMEDIAL PROVISIONS WERE FOUND NOT TO [p. 28] BE RETROACTIVE. THE SIMPLE FACT THAT A STATUTE BECOMES EFFECTIVE, AS THE PLRA DID ON APRIL 26, 1996, DOES NOT MEAN THAT ITS REMEDIAL PROVISIONS MAY GO BACKWARDS.

IT SEEMS TO US THAT THAT'S WHAT THE DEFENDANTS ARE URGING. AND WE THINK THAT THERE IS NO CLEAR DIRECTIVE IN THE STATUTE THAT THEY CAN RELY ON TO STATE THAT THE COMPENSATION CLAUSE APPLIES RETROACTIVELY.

AND, THEREFORE, WE BELIEVE THAT UNDER *LANDGRAF* THE STATUTE DOES NOT APPLY IN THIS CASE AS TO THE COMPENSATION OF THE SPECIAL MASTER.

THE COURT: OKAY. THANK YOU, COUNSEL.

MR. CASSIDY: THANK YOU.

THE COURT: OKAY. YOU LOOK LIKE YOU WANTED TO RESPOND BRIEFLY, MS. LEE.

MS. LEE: YES. MAY I? I JUST HAVE A COUPLE OF COMMENTS.

I JUST NEED TO – WHAT I'M CONCERNED ABOUT IS THE PLAINTIFFS, READING OF THE LIMITATIONS ON POWERS AND DUTIES, SUBSECTION (6)(B): A SPECIAL MASTER APPOINTED UNDER THIS SUBSECTION SHALL NOT MAKE ANY FINDINGS OR COMMUNICATIONS EX PARTE.

AND I – IT SEEMS INCONCEIVABLE TO ME THAT CONGRESS INTENDED TO FORBID SPECIAL MASTERS FROM DOING ANY WORK OUTSIDE OF THE PRESENCE OF BOTH PARTIES.

IT SEEMS TO ME THAT WHAT THIS LIMITATION IS GETTING [p. 29] TO IS THAT A SPECIAL MASTER SHOULD NOT BASE HIS OR HER FINDINGS ON EX PARTE COMMUNICATIONS OR, IN OTHER WORDS, A SPECIAL MASTER'S FINDINGS ARE OPEN TO BOTH PARTIES AND COMMUNICATIONS FROM ONE PARTY TO A SPECIAL MASTER ARE OPEN TO THE OTHER PARTY.

THERE HAVE BEEN CASES WHERE SPECIAL MASTERS HAVE BASED FINDINGS OF FACT ON COMMUNICATIONS MADE TO THEM CONFIDENTIALLY, SAY BY A PRISONER OR BY AN EMPLOYEE OF A PRISON, AND THE SOURCE OF THE INFORMATION WAS NEVER MADE AVAILABLE TO LAWYERS FOR OTHER SIDE, BUT THERE WAS A FINDING OF FACT AND A REMEDY FLOWING FROM IT.

AND THAT IS THE KIND OF EVIL I THINK THAT THIS WAS INTENDED TO GET AT, AND NOT FORBIDDING SPECIAL MASTERS FROM MAKING IMPROMPTU SITE VISITS WITHOUT HAVING LAWYERS FOR BOTH SIDES IN TOW. I THINK YOU CAN

READ THAT A LITTLE BIT MORE COMMON SENSE THAN – THAN THE PLAINTIFFS EXPRESSED JUST NOW.

THE COURT: OKAY. SO THAT I UNDERSTAND THAT POSITION, IS THE IMPORTANT FACET OF THIS SECTION THAT ACTIONS NOT BE TAKEN IN RELIANCE ON EX PARTE COMMUNICATION WITHOUT COMMUNICATING THOSE TO THE OTHER SIDE? IS THAT THE THRUST OF WHAT YOU'RE SAYING? I JUST WANT TO MAKE SURE I UNDERSTAND IT.

MS. LEE: YES. YES, THAT IS WHAT I'M SAYING.

THE COURT: BUT THE SPECIAL MASTER COULD, UNDER YOUR VIEW, MEET WITH YOU AND MR. SIGGINS, AND ANYONE FROM YOUR SIDE, WITHOUT MR. SPECTER BEING PRESENT?

[p. 30] MS. LEE: YES.

THE COURT: BUT THEN COULDN'T SAY, AH, THEY TOLD ME THIS LITTLE THING AND I'M GOING TO SET A WHOLE THING IN ACTION WITHOUT TELLING THE OTHER SIDE. IS THAT THE IDEA?

MS. LEE: YES. AND VICE VERSA. YOU KNOW, AN EASY TO ENVISION EXAMPLE WOULD BE RECEIVING, SAY, A LETTER OF COMPLAINT FROM AN INMATE CONFIDENTIALLY, AND SAYING FORCE WAS USED ON ME FOR NO REASON AND I GOT NO MEDICAL CARE AS A RESULT. AND THAT IT WOULD BE IMPROPER TO BASE A FINDING OF VIOLATION OR TO BASE A REMEDY ON A COMMUNICATION OF

THAT NATURE WITHOUT SHARING IT. THAT'S WHAT I HAVE IN MIND.

AND FINALLY, I THINK IT'S IMPORTANT FOR US TO KEEP IN MIND THAT THE APPLICATION OF THIS LAW DOESN'T TURN ON HOW THIS CASE IS PROCEEDING.

REALLY IT'S IMMATERIAL WHETHER THE WAY WE DO THINGS IN *MADRID VERSUS GOMEZ* IS ACCEPTABLE TO ALL OF US HERE OR NOT. WE'VE ALL BEEN VERY HAPPY WITH THE WAY THINGS HAVE PROCEEDED. BUT CONGRESS PASSED THIS LAW IN RESPONSE TO A PERCEIVED NATIONAL PROBLEM. THIS IS A FEDERAL LAW THAT APPLIES TO ALL OF US.

AND I THINK CONGRESS WAS WELL AWARE THAT THERE WAS PENDING LITIGATION. PEOPLE MIGHT BE HAPPY WITH SOME PARTS OF IT AND UNHAPPY WITH OTHERS, BUT THE LAW DOESN'T TURN ON THOSE FEELINGS. THANK YOU.

THE COURT: OKAY. THANK YOU, MS. LEE.

[p. 31] OKAY. AND THANK BOTH SIDES. THIS HAS BEEN HELPFUL. I THINK THAT THE CONSTITUTIONAL ISSUES THAT WE'VE TALKED TO TODAY MERIT SOME FURTHER CONSIDERATION, AND I THINK I WOULD BENEFIT FROM SOME ADDITIONAL BRIEFING ON THOSE ISSUES FROM YOU.

SO I'M GOING TO ASK YOU TO SUBMIT ADDITIONAL BRIEFING WHICH ADDRESSES THE SEPARATION OF POWERS ISSUE, WHICH I THINK IS A POTENTIALLY IMPORTANT ONE IN THIS MATTER.

AND THEN PLAINTIFFS SHOULD FEEL FREE TO ALSO ADDRESS THE EQUAL PROTECTION AND THE DUE PROCESS ISSUES WHICH YOU REFERRED TO IN PASSING, I WILL SAY, IN YOUR LETTER BRIEF, IF YOU STILL WISH TO PURSUE THOSE ISSUES.

SO I THINK THIS TIME I'LL HAVE PLAINTIFFS FILE FIRST. LET ME FINISH, AND THEN YOU CAN – I'LL HAVE PLAINTIFFS FILE FIRST, SINCE YOU'RE THE PARTIES ASSERTING THE CONSTITUTIONAL CHALLENGE. AND I WOULD SET THIS SCHEDULE SUBJECT TO WHAT I'LL HEAR FROM MR. SPECTER IN JUST A MOMENT.

I'LL ASK PLAINTIFFS TO FILE A SUPPLEMENTAL BRIEF FOURTEEN DAYS FROM TODAY, OR NO LATER THAN JUNE 4TH.

DEFENDANTS, RESPONSE WILL BE DUE TWENTY-ONE DAYS FROM TODAY, OR NO LATER THAN JUNE 11TH.

AND THEN PLAINTIFFS MAY REPLY TO THAT RESPONSE TWENTY-EIGHT DAYS FROM TODAY, OR NO LATER THAN JUNE 18TH.

AT THAT POINT, I WOULD DEEM THE MATTER SUBMITTED ON THOSE PAPERS, UNLESS IN READING THEM I THINK I COULD BENEFIT [p. 32] FROM ORAL ARGUMENT, IN WHICH CASE I'LL NOTIFY YOU.

BUT UNLESS YOU HEAR THAT NOTIFICATION, THE MATTER WILL BE SUBMITTED ON THE PAPERS.

MR. SPECTER.

MR. SPECTER: YES, YOUR HONOR.

WE WELCOME THE OPPORTUNITY TO SUBMIT FURTHER BRIEFING. AND WE WILL PURSUE THE EQUAL PROTECTION ARGUMENT, ESPECIALLY IN LIGHT OF THE COLORADO SUPREME – THE COLORADO GAY RIGHTS CASE THAT CAME OUT TODAY WHICH – OR YESTERDAY, WHICH HAS SOME SIMILARITIES WITH THE ISSUES THAT YOU'RE GRAPPLING WITH, WHICH WE'LL ARGUE.

BUT I ALSO WANTED TO REQUEST THAT WE BROADEN THE SCOPE OF THE BRIEFING AND THIS MAY AFFECT THE SCHEDULE, DEPENDING ON HOW YOU FEEL ABOUT IT.

THE MOST PRESSING – WELL, THERE ARE A NUMBER OF PROVISIONS OF THIS LAW WHICH WE DON'T KNOW HOW THEY'RE GOING TO BE INTERPRETED, AND WE REALLY DON'T KNOW WHAT THE RULES ARE.

THE COURT: BY ME OR BY SOME OTHER COURT, OR BOTH?

MR. SPECTER: WELL, OBVIOUSLY, BOTH. BUT IN THE FIRST INSTANCE, OBVIOUSLY BY YOU. AND WE'D LIKE TO KNOW THE GROUND RULES SOMEWHAT SOON, ALTHOUGH IT'S NOT IMMEDIATE.

THE PROVISION I'M MOST CONCERNED ABOUT IS THE TERMINATION OF RELIEF PROVISIONS IN SECTION 802(B)(1), WHICH, AS I SEE IT, THE SHU ORDER WHICH YOU ISSUED IN DECEMBER OF [p. 33]

LAST YEAR, UNDER THE TERMS OF THAT SECTION, IT SEEMS LIKE THAT SHU ORDER WOULD BE TERMINABLE IN TWO YEARS FROM THE DATE THAT THE ACT WAS ENACTED, WHICH WAS A FEW WEEKS AGO.

AND OUR CONCERN IS TO KNOW WHAT WE BASICALLY ARE GOING TO HAVE TO DO IF – WELL, (A), THE FIRST QUESTION IS WHETHER THAT PROVISION ITSELF IS CONSTITUTIONAL FOR A WHOLE HOST OF REASONS, WHICH I'M SURE YOU'VE THOUGHT ABOUT.

AND SECONDLY, IF IT IS CONSTITUTIONAL, WHAT DO WE HAVE TO DO TO PROVE AN ONGOING CONSTITUTIONAL VIOLATION?

AND ALONG THOSE LINES, ARE WE GOING TO HAVE ANOTHER TRIAL? ARE WE GOING TO NEED DISCOVERY? ALL THOSE KINDS OF ISSUES SHOULD BE FLESHED OUT, IN OUR OPINION, EARLIER RATHER THAN US COMING TO YOU A MONTH BEFORE THE TWO YEARS IS UP.

AND IF YOU READ THE STATUTE, IT HAS A PROVISION FOR AN AUTOMATIC STAY OF THE PROSPECTIVE RELIEF 30 DAYS AFTER THE DEFENDANTS FILE THEIR MOTION TO TERMINATE, WHICH, IN OUR VIEW, WOULDN'T GIVE YOU ANYWHERE NEAR ENOUGH TIME, GIVEN EVEN THE NORTHERN DISTRICT OF CALIFORNIA RULES, TO MAKE, YOU KNOW, A DECISION.

SO WE WOULD LIKE TO BRIEF THAT ISSUE ON A SCHEDULE WHICH THE COURT WOULD FIND

ACCEPTABLE SO THAT WE KNOW WHERE WE'RE STANDING.

AND I THINK, YOUR HONOR, IT'S OUR POSITION THAT WE AGREE WITH MS. LEE WHEN SHE SAYS THAT CONGRESS WAS INTENDING BY THIS ACT, AND PARTICULARLY BY A PROVISION WHICH YOU'VE BEEN [p. 34] GRAPPLING WITH HERE THIS MORNING, TO REIN IN THE DISTRICT COURTS FROM DOING WHAT THEY HAVE BEEN LAWFULLY DOING, YOU KNOW, FOR THE PAST 20 OR 30 YEARS.

AND IN THAT SENSE WE THINK THAT A NUMBER OF THE PROVISIONS SHOULD BE LOOKED AT TOGETHER SINCE IT'S A COMPREHENSIVE SCHEME TO REIN IN THOSE RIGHTS.

IT AFFECTS THE SPECIAL MASTERS. IT AFFECTS THE ABILITY OF THE COURT TO CONTINUE TO DO RELIEF. IT AFFECTS THE ABILITY OF THE ATTORNEYS TO CONTINUE THIS PROCESS THROUGH THE ATTORNEY FEES PROVISIONS WHICH THEY HAVE, WHICH DEFENDANTS HAVE REFERRED TO – I ASSUME YOU'RE AWARE THAT WE'RE ARGUING THIS – WE HAVE A MOTION TO COMPEL FEES BEFORE YOU, WHICH YOU'VE ORDERED US TO SUBMIT IN WRITING. AND THE DEFENDANTS SUBMITTED THE PLRA AS AN ARGUMENT AGAINST IT. AND YOU'VE ORDERED FURTHER BRIEFING ON THAT AS WELL.

AND IT SEEMS TO ME THAT THEY'RE INEXTRICABLY RELATED AND WOULD NOT – WOULD BE BEST HEARD TOGETHER, I GUESS.

SO IF THERE IS NO IMMEDIATE NEED FOR ACTION BY THE COURT ON THE SPECIAL MASTER PROVISION –

THE COURT: SORRY I INTERRUPTED.

MR. SPECTER: OH, I'M SORRY.

I WAS JUST GOING TO SAY IF THERE IS NO IMMEDIATE NEED FOR ACTION ON THE SPECIAL MASTER PROVISION BECAUSE THE JUDICIARY OR THE AOC IS GOING TO PAY FOR IT IN THE MEAN – IN THE INTERIM, WE WOULD SUGGEST A LITTLE LONGER BRIEFING [p. 35] SCHEDULE IN WHICH WE COULD PUT THOSE ISSUES ON THE TABLE IN A FORMAT TOGETHER.

THE COURT: OKAY. HOW URGENT ARE THESE THINGS YOU'VE RAISED? MY INCLINATION IS TO KEEP THE BRIEFING SCHEDULE ON THIS AND THEN SET ANOTHER BRIEFING SCHEDULE THAT WOULDN'T INTERFERE WITH THAT.

DO YOU SEE ANY PROBLEM WITH THAT?

MR. SPECTER: NO, THERE'S NO PROBLEM. WE CAN ALWAYS REFER IN THE OTHER BRIEFING TO –

THE COURT: YEAH, LET'S DO THAT THEN. I'LL KEEP THAT IN MIND. I HAVEN'T THOUGHT ABOUT IT EITHER, BUT I WOULD JUST VENTURE A GUESS THAT CONGRESS DIDN'T HAVE IN MIND, BECAUSE OF WHAT APPEARS TO BE THE WASTEFULNESS OF IT, OF A TRIAL ON THE LIMITATION – ON THE QUESTION OF LIMITATION AND THAT THE LANGUAGE "PROSPECTIVE RELIEF" SHALL NOT

TERMINATE IF THE COURT MAKES WRITTEN FINDINGS BASED ON THE REPORTED.

THAT RAISES A QUESTION OF WHAT IS THE RECORD. I FIND IT HARD TO BELIEVE THAT THE RECORD WOULD BE ANOTHER TRIAL, AND THAT WE CAN PROBABLY DEVISE SOMETHING IN TERMS OF WHAT WOULD CREATE THE RECORD. I DON'T KNOW WHAT THAT WOULD BE, BUT I WOULD HOPE IT WOULD BE SHORT OF A TRIAL. BUT WE CAN CERTAINLY ADDRESS THAT.

MR. SPECTER: WE CERTAINLY SHARE THAT VIEW, YOUR HONOR. I DON'T KNOW WHAT THE DEFENDANTS' POSITION ON THIS IS. BUT CONSTITUTIONAL VIOLATIONS, AS YOU KNOW, TAKE – ARE [p. 36] TWO-PRONGED. THERE'S THE OBJECTIVE AND THE SUBJECTIVE PART OF THE TEST. AND HOW WE'RE GOING TO GET TO THE SUBJECTIVE ONE IS A LITTLE BIT DIFFICULT.

THE COURT: AND, INDEED, JUST TO CARRY THIS ONE STEP FURTHER, IT SEEMS TO ME, WITHOUT GOING INTO WHAT KIND OF LIMITATIONS ARE PLACED BY MR. LONERGAN, BUT IF, FOR EXAMPLE, IT SEEMS TO ME THAT IF THEY CONTINUE TO HAVE DIFFICULTIES GETTING MEDICAL DOCTORS AT PELICAN BAY, AND THAT'S A MATTER OF RECORD, IT SEEMS TO ME FAIRLY SIMPLE THAT I COULD MAKE – THAT WOULD BE A FINDING WITHOUT A TRIAL THAT I COULD CONTINUE THAT PORTION OF THE CASE JUST TO GET SOMETHING THAT SEEMS SIMPLE; THAT THEY'VE GOT TO HAVE A PROPER ISSUE

OF DOCTORS. THAT SEEMS QUITE STRAIGHTFORWARD TO ME.

BUT THAT'S THE SIMPLE ONE, AND YOU'RE ASKING ABOUT THE HARDER QUESTIONS.

MR. SPECTER: WELL, THE OTHER QUESTIONS – I MEAN, JUST TO GIVE YOU AN EXAMPLE. THE HARDEST QUESTION, IN A WAY – AND THE WAY THIS LAW IT LOOKS TO ME TO BE MOST ABSURD IS TO LOOK AT THE SHU ORDER. BECAUSE YOU'VE GOT THE SHU EXCLUSION. YOU'VE TAKEN ALL THE PEOPLE OUT. SO BY THAT ORDER YOU'VE REMEDIED THE CONSTITUTIONAL VIOLATIONS.

SO IN THE SHU THERE'S – IF YOUR ORDER IS COMPLIED WITH, THERE'S NO CURRENT VIOLATION. BUT IF IT WAS – YOUR ORDER WAS TERMINATED, THERE WOULD BE.

SO WHERE DO YOU GO FROM THERE? I MEAN, IT'S A VERY [p. 37] PERPLEXING QUESTION.

THE COURT: YES. OKAY. WELL, THESE ARE THINGS WE'LL ADDRESS IN DUE TIME. OKAY.

LET ME JUST MENTION ONE OTHER THING. DURING YOUR ARGUMENT, MS. LEE, IN RESPONDING TO A COUPLE OF QUESTIONS THAT YOU RIGHTFULLY INDICATED YOU HADN'T HAD SUFFICIENT TIME TO THINK ABOUT THEM – AND YOU, TOO – BOTH OF YOU SHOULD FEEL FREE TO ANSWER THESE QUESTIONS, BUT LIMITED TO THIS BY LETTER BRIEF, SAY, BY FRIDAY.

MS. LEE: ALL RIGHT. THANK YOU.

THE COURT: OKAY. TO ME. NOT TO EACH OTHER. OKAY.

MR. SPECTER: YES.

THE COURT: THAT WILL GIVE YOU A LITTLE MORE TIME TO THINK ABOUT THESE THINGS.

MR. SPECTER: IT FELT LIKE A BAR EXAM IN HERE.

THE COURT: SOME MORE WRITING TO DO. YOU DON'T HAVE TO. IN CASE YOU LOOK AT THESE MORE CAREFULLY AND HAVE SOME THOUGHTS THAT YOU THINK WILL BE HELPFUL TO ME IN RESOLVING THESE ISSUES, THAT'S THE IDEA BE BEHIND THAT.

OKAY. THANK YOU, COUNSEL.

MR. SPECTER: YOUR HONOR –

THE COURT: PARDON?

MR. SPECTER: CAN I ASK YOU A COUPLE OTHER QUESTIONS?

THE COURT: CERTAINLY.

[p. 38] MR. SPECTER: IT DOESN'T REALLY RELATE TO THIS CASE AS MUCH AS THE OTHER CASES. AND IT REFERS TO THE MEMO THAT YOU SAID THAT WAS GOING TO COME OUT FROM THE AOC.

DID THEY GIVE YOU AN IDEA OF WHEN THAT WAS GOING TO BE ISSUED?

THE COURT: YOU TALKED TO THEM, KAREN. SOON. BUT WHEN?

MS. KRAMER: THIS WEEK, HOPEFULLY.

MR. SPECTER: OH, VERY SOON.

THE COURT: YEAH, VERY SOON.

MS. KRAMER: I'M NOT PROMISING THIS WEEK, BUT IMMINENTLY. IN THE NEXT WEEK OR TWO.

MR. SPECTER: THAT'S ALL I HAD. THANK YOU.

THE COURT: OKAY. THANK YOU, COUNSEL.

(HEARING CONCLUDED AT 4:30 P.M.)

CERTIFICATE OF REPORTER

I, ROBERTA L. ROGERS, OFFICIAL REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA 94102, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 2 THROUGH 38, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

ROBERTA L. ROGERS, CSR

**EXHIBIT M**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEJANDRO MADRID, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES GOMEZ, Director, California Department of Corrections, et al.,

Defendants.

NO. C90-3094-TEH

CLASS ACTION

ORDER

(Filed Jul. 26, 1996)

Pending before the Court is the question of the applicability of section 802(f)(4) of the Prison Litigation Reform Act ("PLRA") to the instant case. Having reviewed the parties' original and supplemental briefs, their oral arguments, and the record herein, the Court concludes that section 802(f)(4) does not apply to this case. A full decision explaining the Court's reasoning will follow as soon as possible. The Court issues this abbreviated ruling now, however, in the interests of minimizing the current uncertainty regarding the applicability of § 802(f)(4) to this case.

The Court has also been informed by the Special Master that the current funds deposited by defendants to cover the expenses of the Special Master and retained experts and staff have been almost entirely depleted. The current balance will not be sufficient to allow for the implementation and monitoring of an effective remedy

for the constitutional violations found in this Court's January 10, 1995 decision. Accordingly, and in light of the above ruling, it is FURTHER ORDERED that defendants shall, within 21 days of the date of this Order, deposit an additional $150,000 into the Court account established by this Court's January 10, 1995 decision.

IT IS SO ORDERED.

DATED 7/25/96 /s/ Thelton E. Henderson
Thelton E. Henderson,
Chief Judge
United States District Court.

**EXHIBIT N**

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| ALEJANDRO MADRID, et al., Plaintiffs, v. JAMES GOMEZ, et al., Defendants. | No. C-90-3094 TEH<br>NOTICE OF APPEAL<br>(Filed Feb. 8, 1995) |

NOTICE IS HEREBY GIVEN THAT:

Defendants James Gomez, Charles D. Marshall, Terry Peetz and Alex Astorga, M.D.[1] appeal the preliminary

[1] Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, the following parties are substituted in their official capacities: interim Warden J.S. Stainer is substituted for retired Warden Charles D. Marshall; Chief Deputy Warden Robert L. Ayers is substituted for retired Chief Deputy Warden Terry Peetz; and interim Chief Medical Officer Dr. David Cooper is substituted for resigned Chief Medical Officer Dr. Alex Astorga.

injunction entered in this action on January 10, 1995, to the United States Court of Appeal for the Ninth Circuit.

DATED: February 8, 1995

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

PETER J. SIGGINS
Senior Assistant
Attorney General

/s/ Susan Duncan Lee
SUSAN DUNCAN LEE
WILLIAM N. JENKINS
Deputy Attorneys General

Attorneys for Defendants

**DECLARATION OF SERVICE BY MAIL**

**Case Name:** ***MADRID et al. v. GOMEZ, et al.***

**Case No.:** ***C-90-3094 TEH***

I declare that:

I am employed in the County of San Francisco, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 455 Golden Gate Avenue, Suite 6200, San Francisco, California 94102.

On February 8, 1995, I served the attached

**NOTICE OF APPEAL**

In said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in

the United States mail at San Francisco, California, addressed as follows:

**DAVID STEUER**
**SUSAN CREIGHTON**
**BERNARD J. CASSIDY**
**WILSON, SONSINI, GOODRICH & ROSATI**
**A Professional Corporation**
**Two Palo Alto Square, Ste. 900**
**Palo Alto, CA 94306**

**DON SPECTER**
**STEVEN FAMA**
**PRISON LAW OFFICE**
**General Delivery**
**San Quentin, CA 94964**

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on February 8, 1995.

/s/ A. Albano
A. ALBANO

---

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CIVIL APPEALS DOCKETING STATEMENT

LEASE TYPE OR PRINT, ATTACH ADDITIONAL PAGES IF NECESSARY.

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**TITLE IN FULL:**

Alejandro Madrid, et al.,

Plaintiffs,

v.

James Gomez, et al.,

Defendants.

**DISTRICT:**
Northern

**JUDGE:**
Thelton E. Henderson

**DATE COMPLAINT FILED:**

**DISTRICT COURT DOCKET NUMBER:**
C-90-3094-TEH

**DATE NOTICE OF APPEAL FILED:**
02/08/95

**IS THIS A CROSS-APPEAL?**
_ YES X NO

**HAS THIS MATTER BEEN BEFORE THIS COURT PREVIOUSLY? _ YES X NO**
**IF YES, STATE WHEN:**

**CASE NAME:**

**CITATION:** **DOCKET NUMBER:**

**CHECK AS MANY AS APPLY**

JURISDICTION

| 1. FEDERAL | 2. APPELLATE |
|---|---|
| [X] FEDERAL QUESTION | [X] FINAL DECISION OF DISTRICT COURT |
| [ ] DIVERSITY | [ ] INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT |
| [ ] OTHER SPECIFY: | [ ] INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY) |
| | [ ] OTHER (SPECIFY) |

DISTRICT COURT DISPOSITION

| 1. STAGE OF PROCEEDINGS | 2. TYPE OF JUDGMENT ORDER APPEALED | 3. RELIEF |
|---|---|---|
| [ ] PRE-TRIAL | [ ] DEFAULT JUDGMENT | [ ] DAMAGES: AMOUNT SOUGHT: $ ___ |
| [ ] DURING TRIAL | [X] JUDGMENT/ COURT DECISION | |

| | | |
|---|---|---|
| [X] AFTER TRIAL | [ ] DISMISSAL/ JURISDICTION | AMOUNT [ ] GRANTED: [ ] DENIED: $ ___ |
| | [ ] JUDGMENT/ JURY VERDICT | [X] JURISDICTIONS: [ ] PRELIMINARY OR [X] PERMANENT |
| | [ ] DISMISSAL/ MERITS | [X] GRANTED OR [ ] DENIED |
| | [ ] SUMMARY JUDGMENT | |
| | [ ] JUDGMENT NOV | |
| | [ ] DECLARATORY JUDGMENT | |
| | [ ] DIRECTED VERDICT | |
| | [ ] OTHER (SPECIFY) | |

DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

Please see attached.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

Probably the only issue defendants will raise on appeal is the scope of the District Court finding that certain categories of mentally disordered inmates may not be housed in the Security Housing Unit under present conditions.

*MADRID V. GOMEZ, et al. – USDC ND Case No. 90-3094 TEH*

**BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:**

Plaintiffs are a class comprising all inmates at Pelican Bay State Prison. Defendants are correctional officials sued in their official capacities. Plaintiffs sued under 42 United Stated [sic] Code section 1983 alleging violations of their civil rights in the following respects:

1) pattern and practice of use of excessive force;

2) unconstitutionally inadequate system for delivery of medical care;

3) unconstitutionally inadequate system for delivery of mental health care;

4) cruel and unusual living conditions in the Security Housing Unit;

5) denial of due process in systems for identifying prison gang members and for assigning prison gang members to segregated housing for indeterminate periods;

6) deliberate indifference to prisoners' safety in systems for making housing assignments;

7) deprivation of access to courts as a result of inadequate system for law library access.

The District Court found in favor of plaintiffs on numbers 1, 2, and 3. The District Court found in favor of defendants on number 4, except that the court found that certain categories of mentally disordered inmates may not be confined in the Security Housing Unit under present conditions. The District Court found in favor of defendants on number 5, except that the District Court

required one minor change in the documentation of the gang identification process. The District Court found for defendants on number 6. The District Court deferred issuing a decision on number 7.

**OTHER PROCEDURAL COMPLEXITIES:**

Appellants request a pre-briefing conference and a Stay of Briefing pending completion of a remedial plan. The parties are currently ordered to work jointly with the Special Master to develop a remedial plan to address all constitutional violations identified in the order. At this time, the deadline for completion of the remedial plan is May 10, 1995. Defendants anticipate a possibility that the mental health issue might be resolved in the remedial process. If that were to occur, there might be no need to proceed with the appeal.

**DECLARATION OF SERVICE BY MAIL**

***Case Name:*** ***MADRID et al. v. GOMEZ, et al.***

**Case No.:** ***C-90-3094 TEH***

I declare that:

I am employed in the County of San Francisco, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 455 Golden Gate Avenue, Suite 6200, San Francisco, California 94102.

On February 8, 1995, I served the attached

**CIVIL APPEALS DOCKETING STATEMENT**

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in

the United States mail at San Francisco, California, addressed as follows:

**DAVID STEUER**
**SUSAN CREIGHTON**
**BERNARD J. CASSIDY**
**WILSON, SONSINI, GOODRICH & ROSATI**
**A Professional Corporation**
**Two Palo Alto Square, Ste. 900**
**Palo Alto, CA 94306**

**DON SPECTER**
**STEVEN FAMA**
**PRISON LAW OFFICE**
**General Delivery**
**San Quentin, CA 94964**

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on February 8, 1995.

/s/ A. Albano
A. ALBANO

EXHIBIT O

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| ALEJANDRO MADRID, et al., Plaintiffs-Appellees, vs. JAMES GOMEZ, Director, California Dept. of Corrections, et al., Defendants-Appellants. | No. 95-15260<br>DC# CV-90-3094-TEH Northern California<br>ORDER<br>(Filed Apr. 6, 1995) |

Before: BROWNING, SNEED and T.G. NELSON, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is granted. *See* 28 U.S.C. § 1291; *Balla v. Idaho State Board of Corrections*, 869 F.2d 461, 464 (9th Cir. 1989).

**EXHIBIT P**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETE WILSON, JOSEPH SANDOVAL, JAMES GOMEZ, NADIM KHOURY and JOHN ZIL,

Petitioners,

v.

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent,

RALPH COLEMAN, et al.,

Real Parties in Interest.

No. 96-70640

D.C. No. CIV S-90-0520-LKK

ORDER

---

DIRECTOR JAMES GOMEZ, WARDEN STEVEN CAMBRA, CHIEF DEPUTY WARDEN ROBERT AYERS, and CHIEF MEDICAL OFFICER SUSANN STEINBERG,

Petitioners,

v.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

ALEJANDRO MADRID, et al.,

Real Parties in Interest.

No. 96-70659

D.C. No. C-90-3094 TEH

(Filed Oct. 18, 1996)

| | | |
|---|---|---|
| JAMES GOMEZ, NADIM KHOURY, SYLVIA BLOUNT, CLYDE MURREY, DANIEL E. THOR, EDDIE YLST, KENNETH SHEPARD, PAUL MORENTZ, DOUGLAS ARNOLD and BRUCE BAKER and their successors in interest, | ) | No. 96-70687<br>D.C. No.<br>87-1636 LKK |
| Petitioners, | ) | |
| v. | ) | |
| UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, | ) | |
| Respondent, | ) | |
| JAY LEE GATES, et al., | ) | |
| Real Parties in Interest. | ) | |

These three cases are consolidated for oral argument on November 7, 1996, in San Francisco. Petitioners are allocated a total of 20 minutes for argument, and real parties in interest are allocated a total of 30 minutes. Counsel for real parties in interest shall divide the time between themselves. If they are unable to do so, the court shall divide the time for them.

By Direction of the Court

CATHY A. CATTERSON
Clerk of Court

By /s/ Gwen Baptiste
Gwen Baptiste
Deputy Clerk